National Library of Canada
Canadian Theses Service
Ottawa, Canada
K1A 0N4

Bibliothèque nationale du Canada
Services des thèses canadiennes

CANADIAN THESES

THÈSES CANADIENNES

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30.

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

NL-339 (r. 86/06)

Canada

THE UNIVERSITY OF ALBERTA

ADOPTION IN CANADA

by

© Lynn Kettler Penrod

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF LAWS.

FACULTY OF LAW

EDMONTON, ALBERTA

SPRING, 1986

Permission has been granted to the National Library of Canada to microfilm this thesis and to lend or sell copies of the film.

The author (copyright owner) has reserved other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without his/her written permission.

L'autorisation a été accordée à la Bibliothèque nationale du Canada de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur (titulaire du droit d'auteur) se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation écrite.

ISBN 0-315-30121-X

THE UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: Lynn Kettler Penrod

TITLE OF THESIS: Adoption in Canada

DEGREE FOR WHICH THESIS WAS PRESENTED: Master of Laws

YEAR THIS DEGREE GRANTED: 1986

Permission is hereby granted to THE UNIVERSITY OF ALBERTA LIBRARY to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly, or scientific research purposes only.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

Lynn Kettler Penrod

PERMANENT ADDRESS:

9626 - 85 Avenue
EDMONTON, Alberta
T6C 1H4

Spring, 1986

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled Adoption in Canada submitted by Lynn Kettler Penrod in partial fulfilment of the requirements of the degree of Master of Laws.

Christine Davies
(Supervisor)

Norah Keating

Date: April 7, 1986

ABSTRACT

Adoption, although unknown to English common law, is today widely accepted in western society as one possible solution to the problems of two groups of people: childless couples and children without families. This thesis presents an overview of adoption in Canada — its historical development, its procedural requirements, and an analysis of current major issues.

Chapter I provides an outline of what adoption is and how it has been viewed through history and across cultural boundaries. This chapter also discusses the arrival of adoption in Canada, gives a brief legislative history of Canadian statutes dealing with adoption, and presents some basic values and assumptions underlying the adoption process.

Chapter II focuses on the necessary legal steps required in adoption: who may adopt and who may be adopted, jurisdictions, consent (and revocation thereof), probationary periods and home studies, notice of hearing, and the adoption hearing itself.

Chapter III examines the legal effects of an adoption order: how the adoption order affects the child's property rights, his capacity to marry, his custody and/or access, and his "right to know" the full history of his origins.

Chapter IV is devoted to a discussion of current issues in Canadian adoptions, customary adoption among the Inuit, adoption as it affects Canadian Indians, the problems involved in step-parent adoptions, post-adoption access, adoption and the putative father, adoption and its relation to surrogate motherhood, subsidized adoption, and the Canadian Charter of Rights as it may affect adoption in the future.

ACKNOWLEDGEMENTS

I should like to thank Professor Christine Davies for her helpful guidance in the preparation of this thesis and Professors Norah Keating and Leonard Pollack for serving on my examining committee.

I should also like to express my appreciation to Susan Murk for her careful preparation of the manuscript.

TABLE OF CONTENTS

		PAGE
INTRODUCTION		1
CHAPTER I	ADOPTION - HISTORY AND PHILOSOPHY	14
CHAPTER II	ADOPTION IN CANADA - PROCESS AND PROCEDURE	64
	Adoption and Capacity: Who May Adopt? Who May Be Adopted?	78
	Jurisdiction in Canadian Adoption	79
	Probationary Periods and Home Studies	80
	Notice of Hearing	82
	The Adoption Hearing	84
	Consent to Adoption	89
	Revocation of Consent to Adoption: Parental Rights v. Best Interest of the Child	90
	Dispensing with Consent to Adoption	115
CHAPTER III	THE LEGAL EFFECTS OF AN ADOPTION ORDER	144
	Legal Effects of the Adoption Order: Statutory Provisions	145
	Adoption and Property Rights	155
	Adoption and the Capacity to Marry	169
	Adoption, Custody, and Access	180
	Adoption Orders and the Confidentiality of Adoption Records	197
CHAPTER IV	CANADIAN ADOPTION TODAY: ISSUES, TRENDS, PROBLEMS	229
	Canadian Customary Adoption	230
	Adoption and Canadian Indians	236
	Step-Parent Adoptions? Some Possible Alternatives	241
	Adoption and Access: Yes or No?	247
	Private Adoption--Present and Future	253
	Adoption and the Putative Father	258
	Adoption and Surrogate Motherhood	263
	Adoption and Subsidies	268
	Adoption and the Charter	270
BIBLIOGRAPHY		280

INTRODUCTION

ADOPTION IN CANADA

> adop-tion...1: act of adopting or state of being adopted 2: the taking of an outsider into a family, clan, or tribal group usu. by investing him with the rights and responsibilities of a member by birth but occas. by giving him only a subservient status
>
> ---Webster's Third International Dictionary

> On est toujours l'enfant de quelqu'un.
>
> -----Beaumarchais

Adoption, this "taking of an outsider into a family, clan, or tribal group usually by investing him with the rights and responsibilities of a member by birth but occasionally by giving him only a subservient status,"[1] although unknown to English common law, is today widely accepted in western society as one possible neat and sensible solution to the problems of two groups of people: childless couples and children without families. Yet society's underlying attitudes about adoption remain somehow ambivalent perhaps because as a social and legal process it brings all its participants, including members of the legal profession who work in the area, into direct contact

with some very basic, and often discomfiting, attitudes and positions: how one feels about "blood relationships," kinship, and inheritance; how one views the relative importance of the nuclear family as a basic institution for social organization; questions of sexual morality (birth control, abortion, surrogate motherhood, illegitimacy, rights of putative fathers); one's views on feminism, as well as one's personal sense of altruism.

Of course the dilemma of what to do with unwanted, abandoned children or children who as a result of accident, illness, or economic misfortune find themselves alone in the world is a problem which has always existed. Infanticide, institutionalization, and fostering are all options which have been practiced with greater or less frequency throughout history by various cultures. Infanticide would appear to be no longer viable in "modern" societies; and it seems, too, that institutions (orphanages, group homes, etc.) by and large have not met the emotional needs of children without families. And fostering provides neither the permanence required by the children themselves nor the legal security preferred by their substitute parents. Thus over the last century we have seen in Canada (and in the United States and England) the passage of ever more comprehensive adoption laws, laws which function so as to sever the child's links with his original family and which give him equal status with the biological children of his adoptive parents. Although doubts still remain as to whether or not children can be successfully "transplanted" into

another family, adoption as process has made steady progress in Canada, England, and the United States despite a strong cultural bias in favour of the absolute primacy of the biological link between parents and children.[2]

When we study the process of adoption as it touches the world of law (and since adoption exists solely as a "creature of statute" it belongs of necessity to the domain of lawyers and judges), we soon realize that adoption must be framed in a broader context if we are to analyze and evaluate the legal procedures currently in place. Adoption rests on the borders of sociology, psychology, and anthropology as well as social work. Patterns of family life and questions of social class, ethnic background, economic status, and social mobility are all clearly relevant as are questions/issues involving the developmental stages of the child's psyche and the relative emotional stability of adult "parents," whether biological or adoptive. Although drafters of adoption legislation may have preferred to believe that psychological and/or sociological information carries no implications for the nuts and bolts of the statutory death and rebirth of Baby X to Baby Z, it seems obvious after a careful review of the evolution of adoption legislation in Canada over the past fifty years as well as a study of cases litigated that such information does indeed make a difference.

If we look at adoption practices at different times in history as

well as in different cultures, we soon discover that it is a society's moral views which have influenced its adoption practices much more heavily than mere pragmatic considerations. For example, in a basically secular and pluralistic society such as Canada, what is right is usually more or less defined as what works best, especially when it comes to providing care for neglected children. Yet as Benet has pointed out, even so, adoption practice is influenced by the kind of society we want to have. Opponents of liberalized views regarding premarital sex are often also hostile to adoption on the grounds that it permits an unwed mother to escape "punishment" for having a child out of wedlock; other more sophisticated economic analysts object that adoption can be and is often used as a rich person's charter against minority groups.[3]

In countries where adoption is still (or has been in the past) a very strong tradition, it has been part of an extended family system which we in western industrialized societies have destroyed through the process of industrialization. In countries where adoption is part of an extended family system, relatives are often preferred adoptees; and adoption is regularly practiced as a means of making social ties among kin even stronger. Of course, in Canada and England and the United States we also adopt within families (especially given the rising number of divorces and remarriages and the resultant adoption of children by step-parents), and it is equally true that adoption has always been known to exist in our society even when no laws were

officially on the books. Yet what we tend to mean when we speak of adoption is the adoption of a "non-related" child, whose parents are unknown to us, through an agency or some other go-between.[4]

What appears to be a characteristic marking western adoption is our idea that its primary rationale is to rescue the child separated from his natural family. Our ideal remains to sever the links between the adoptee and his original family and for natural parents and adoptive parents to remain forever strangers. As Benet points out, this desire for secrecy would seem bizarre to most other cultures which practice adoption since "to the ancients, the Asians, and the primitives, adoption was more often than not a quite deliberate transaction between two sets of parents."[5]

Our rather reluctant and distinctive approach to adoption would seem to be traceable to the break-up of the extended family under the impact of industrialization and urbanization. We had no strong tradition of adoption, but we were forced finally to pass laws to meet a crisis situation. In the words of Bowlby:

> It is probably only in communities in which the greater family group has ceased to exist that the problem of deprived children is found on a serious scale... Not only does such a broken-

> up community provide no substitutes should a mother or father be temporarily or permanently incapacitated but, by putting this great load on parents, it may destroy a family which in better circumstances could hold together.[6]

Our emphasis on the nuclear family would seem to indicate that the fewer number of ties actually remaining become necessarily even closer and more intense. For the modern parent, giving up a child for adoption implies the loss of one of his remaining human links. Thus the only children who are relinquished for adoption in Canadian society are those whose parents are totally unable to keep them-whether because of the social stigma still attached in many quarters to unmarried parenthood or because of extreme poverty or youth or some other practical considerations. Adoption has thus come to be viewed as a second-best alternative for the building of a family unit, something that is not really "supposed" to happen, some sort of indication that on the one hand the child's natural parents "failed" (in that they did not or could not provide for him) and that on the other hand the adoptive parents have also "failed" (in that they could not or would not have children of their own).

Obviously Canadian society would seem still to consider the nuclear family as the principal social building block, and it would seem clear that the extended family system mentioned above will never have

a place in a country as geographically extensive and proportionately sparsely populated as Canada. The sharing of parental roles is a seemingly difficult task for Canadian families to practice in everyday life in the 1980's.

Adoption of a child by a second set of parents has come to be viewed as an exclusive form of parenting over the course of the past century, and much of the legislative history concerning adoption underlines the "completeness" of the adoption procedure. Yet at the same time we have also seen a growing desire on the part of many adoptees to find out more about their biological origins--and many adoptive parents who have begun, gradually, to accept this curiosity as normal. Biological parents, too, have begun to search for a child they gave up in the past in order to establish some kind of kinship tie in the present. Concepts such as legal guardianship and long-term fostering as well as the development of various adoption registry systems to provide more open information to those involved in the adoption process, once totally in disfavour, are now being re-examined in the light of changing perceptions of adoption in society.

In general, the history of adoption in English common law jurisdictions is to a large extent the history of its victory over the many obstacles in its path. At one time adopters were commonly thought of as exploiters of children, and relinquishing parents (especially mothers who surrendered their children) were considered to be in

gross dereliction of their parental duties. The punitive attitude toward poverty, which we in North America inherited directly from the English Poor Laws, seems to have been hard to eradicate from adoption practice. Even today's overlapping and sometimes conflicting areas of jurisdiction are leftovers from an historical division of poor relief and welfare work among the Church, the government, and private charities.

Yet adoption is alive and well today in all Canadian jurisdictions. However, as a legal process it has undergone many changes since the first adoption statute was passed 112 years ago in New Brunswick.[7] Thus our general objective in this study will be to provide an overview of the history of adoption law in Canada from 1873 to the present, to attempt to indicate some of the problems inherent in the statutory provisions of the various provinces and examine how Canadian courts have dealt with them, and to point out future trends and/or problems which may arise.

A cursory review of the available literature on legal aspects of Canadian adoption would lead us to the conclusion that the topic is not one which has been systematically studied in any serious way. In the latest edition of the major Canadian textbook on family law, Christine Davies' Family Law in Canada,[8] there are but six references to adoption and then only to adopted child or adoption as they relate to other areas of family law (access, custody, whether an adopted

child is a "child of the marriage," dispensing with consent). Philip Hepworth's monograph, Foster Care and Adoption in Canada,[9] concentrates on the social work aspect of adoption rather than the legal aspects and discusses statistics concerning numbers and characteristics of children "in care" and/or available for adoption, applications received and processed, and characteristics of adopted children and adoptive parents. Clare Marcus has written two monographs, the Self-Help Counsel series volume Adopted?[10] and a more personal book on adoption, Who is My Mother?[11], both of which focus narrowly on the process by which adult adoptees can attempt to discover their roots through various search and reunion techniques. The most recent Canadian book on adoption, Paul Sachdev's Adoption: Current Issues and Trends[12], is a collection of essays about philosophy and concepts in adoption, process in adoption, dilemmas in adoption, adoption's current trends and future outlooks. However, only four of the twenty essays deal specifically with Canadian adoption. The only book-length study of Quebec adoption is Reine Landry's Le Cri de l'adopté[13] which, like Clare Marcus' works, focuses more on the adoptee's search for his biological origins than on any "legal" ramifications of adoption.

One of the best introductions to Canadian adoption law is Margaret Hughes' review essay, "Adoption in Canada," which appeared some thirteen years ago in Studies in Canadian Family Law.[14] Other articles (in both official languages and of varying length and

quality) have appeared from time to time in various Canadian (as well as American or British) law journals, but they tend also to focus on very specific issues: the problem of inheritance and the adopted child, questions of access and custody as they relate to adoption, step-parent adoptions, adoption and religion, native or Eskimo customary adoption, adoption and the prohibited degrees of marriage, and the sealed records controversy.

In Chapter I we shall sketch a brief history of what adoption is and how it has been viewed through history and across cultural boundaries. We shall trace the arrival of adoption in Canada and provide a brief legislative history of Canadian statutes dealing with the adoption process. We shall also discuss some of the principles, values, and assumptions underlying the adoption process.

In Chapter II we shall move from a rather generalized view of Canadian adoption law to a more detailed examination of adoption as process and proceed through an analysis of the necessary legal steps involved in adoption. We shall consider the questions of who may adopt and who may be adopted, jurisdiction of courts in adoption, the various consents required in the process, the probationary period, the home study, the requirements of notice of hearing, the adoption hearing itself, the adoption order, and the procedures for appeal or setting aside. Obviously our major interest for a review of case law here will involve the issue of consent to adoption (and revocation

thereof) with passing reference to cases involving jurisdictional problems, notice provisions, and appeals.

Following this discussion of the prerequisites to an order for adoption, we shall move, in Chapter III, to an examination of the effects of an adoption order: how the adoption order affects the child's property rights (i.e., inheritance from his natural and/or adoptive family), how the order for adoption affects the individual's capacity to marry, the effects of adoption orders on matters of custody and access of the child, and finally, the effect of sealed adoption records as they relate to the individual adoptee's "right to know" the full history of his origins.

In our concluding chapter, Chapter IV, we shall deal with several topics which are peculiarly Canadian (the constitutional issue concerning provincial legislation in the area of adoption as it relates to the Federal Indian Act and the area of customary adoption as practiced by the Inuit and certain native Indian bands) and discuss several other current issues: alternatives to step-parent adoptions, post-adoption access, the role of the putative father, adoption subsidies, and the potential effect of s.15 of the Charter on future adoption litigation.

Adoption is an incredibly changing and changeable process and one which readily becomes a fascinating topic for research. Although at

first glance one might consider the study of adoption law to be no more than a basic exercise in statutory interpretation, one soon finds oneself deeply involved in difficult questions of public policy, morality, and the age-old problem of defining "the best interest of the child."

What, then, is adoption in Canada? How does adoption "happen"? And after adoption? What are the procedures we follow and why? Should some of them be modified? To what end? How have our social attitudes changed towards adoption over the past century? How are changes in society's perceived goals reflected in legislation? In judicial pronouncement? It is to these questions that our study of adoption in Canada is addressed.

NOTES

1 Webster's Third International Dictionary.

2 Note that in English common law parental rights and duties were traditionally inalienable. See further the reports of the 1924-25 Parliamentary debates in England concerning the passage of the first English Adoption Act (1926): Parliamentary Debates (Official Report), House of Lords, LVI (5th Ser.; March 18, 1924), 808-817, and House of Commons CLLXXXII (5th Ser.; April 3, 1925), 1707-17, reprinted in Grace Abbott, The Child and the State (Chicago: University of Chicago Press, 1938), vol. 2, pp. 204-213. We shall see throughout the course of this study the recurring resistance to the process of adoption as somehow an "unnatural" interference with the bond existing between natural parent and child.

3 Mary Kathleen Benet, The Character of Adoption (London: Jonathan Cape, 1976), pp. 11-21.

4 Ibid., p. 14.

5 Ibid.

6 John Bowlby, Child Care and the Growth of Love (Harmandsworth: Penguin Books, 1953), p. 295.

7 The Adoption of Children, Consolidated Statutes of New Brunswick 1877, c. 49.

8 Christine Davies, Family Law in Canada (Toronto/Calgary/Vancouver: Carswell Legal Publications, 1984), pp. 78, 306, 315-316, 454, 456, 532.

9 H. Philip Hepworth, Foster Care and Adoption in Canada (Ottawa: Canadian Council on Social Development, 1980).

10 Clare Marcus, Adopted? (Vancouver: International Self-Counsel Press, 1979).

11 ----------, Who is My Mother? (Toronto: Macmillan of Canada, 1981).

12 Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984).

13 Reine Landry, Le Cri de l'adopté (Québec: Stanké, 1984).

14 Margaret E. Hughes, "Adoption in Canada," in Derek Mendes Da Costa, ed., Studies in Canadian Family Law (Toronto: Butterworths, 1972), vol. I, pp. 103-177.

CHAPTER I

ADOPTION -- HISTORY AND PHILOSOPHY

> Adoption is as old as human society itself. Tradition has it that our culture was begun by foundlings: Romulus and Remus suckled by the wolf, and Moses rescued from the bulrushes. This is part of the general propensity of civilizations to invent myths about their supernatural origin--their founders must be seen as belonging unequivocally to the new order rather than to the old, and one way to achieve this discontinuity is to make a mystery of their parentage and the circumstances of their birth.
>
> -----Mary Kathleen Benet
>
> The Character of Adoption

No matter how we arrive at the fact of adoption, the process of adoption remains essentially the creation of a factitious blood relationship between persons who are not actually so related. According to Sir Henry Maine, adoption is one of the oldest and most widely utilized of legal fictions.[1] Many ancient societies made use of the process of adoption, and it has proven to be one of the most enduring artificial relationships used by man to prolong the

continuity of family existence.

If we look at even the most primitive societies, we soon discover that those who are related by blood seem to gravitate naturally to each other in order to form a basic living unit, the family. Each higher level of social organization--from house to tribe to state--was also predicated upon blood relationship. Maine tells us that although not every early society was actually formed by descent from the same ancestor, all those which achieved permanence were so descended or were assumed to be. This assumption, however, according to Huard, "was nearly always false since everywhere men of alien descent were admitted into families other than their own."[2] Thus we are able to trace the presence of the practice of adoption to the Greek states, Rome, the Teutonic aristocracies, the Celtic clans, the Slavonic Russians, and the Poles.

There are many obvious reasons why adoption was always important historically. For one thing, survival, especially that of children, was notoriously uncertain. To ensure any kind of social group continuity, there needed to be fairly flexible arrangements for incorporating new members into the group and to provide substitute parents when required. If a ruling group hoped to hold on to its power, it absolutely had to attach to itself sufficient numbers of talented members of the next generation.

As Benet points out, from the very earliest times, a distinction was made between what we might call social paternity as opposed to physical paternity--with social paternity usually being more important (and typically established by the marriage of the child's mother). The Romans said, "pater est quem nuptiae demonstrant;" the early English, "whoso boleth my kyne, ewere calf is mine."[3] It is obviously this particular distinction which makes adoption possible. It was clearly impossible to change the fact of physical paternity, but in social terms one could theoretically transfer parental rights and responsibilities.

It is significant, however, that ancient adoptions were of a deeply religious nature, and adoption procedure rather resembled an initiation into a new religious order as well as into a new and different family. According to Kocourek and Wigmore, "the duty of perpetuating the domestic worship was the foundation of the law of adoption among the ancients."[4] Adoption thus practiced consisted in complete severance of relationship between the adoptee and his biological family and the adoptee's total acceptance into the family of his adoptive parent or parents.

Even the earliest codes of law--the Babylonian Code of Hammurabi and the Hindu Laws of Manu--make mention of the practice of adoption. Nearly 2,000 years before the birth of Christ, we find in the Hammurabi Code the following proposition:

> If a man take a child in his name, adopt, and rear him as a son, this grown up son may not be demanded back. If a man adopt a child as his son, and after he has taken him, he transgresses against his foster-father, that adopted son shall return to the house of his own father.[5]

The Code of Hammurabi also deals with some of the risks still inherent in every adoption today: that the adoptive parents will treat the adopted child differently from their natural child, that the child will suffer from a change of caretaker, and that the adopted child and family might turn out to be unsuited to each other.

Babylonian adoption, however, only remained valid so long as the adopting parent treated the child in every way as his own. If the child persisted in searching for its father and mother, it was returned to the natural parents.

In Babylonia the main object of adoption was originally to acquire a son to perpetuate the family line and to perform the religious rites due to the adopter after death; but purely secular reasons, such as the continuation of his business or his maintenance in old age, also played their part in this institution. The Attic rule that a man could adopt a son only if he had none of his own was not strictly observed in Babylonia.[6]

Similarly the Laws of Manu, a code dated variously at 200 B.C. and 100 A.D. but which represents a codification of laws dating from as early as 1000 B.C., also provide for a primitive form of adoption.

Adoption was also perhaps known to the Israelites and the Egyptians, and many legal historians infer an adoption from the story of Moses and the Pharoah's daughter in the Book of Exodus: "And she adopted him for a son, and called him Moses, saying: Because I took him out of the water."[7] However, other historians insist that the evidence for adoption in the Bible is very equivocal, and some deny it was ever practiced by the Israelites at all. Unlike the Babylonians, who were socially organized as farmers in the Tigris-Euphrates valley, and who thus inherited and passed on tracts of land associated with ancestor cults (like the peoples of China and India), the Israelites were organized as nomadic desert tribes and thus had a different attitude towards the ancient ways of obtaining heirs. The adoption of Moses proves only perhaps that the Egyptians (another farming culture) knew of adoption and practiced it.

It is important to note, however, that from the various nomadic peoples in the Middle East came modern society's three great transcendant religions--Judaism, Christianity, and Islam; and the attitudes of these religions towards the practice of adoption remain relevant even today.

Islam has traditionally remained strongly opposed to adoption--in part because the religion has continued a tradition of polygamy and easy divorce, and adoption would appear to be in widespread use only in societies where alternatives to it were few. The patriarchal nature of Islam also militates against adoption. A man need not marry his child's mother in order to legitimate the child. He is also free to recognize any child of his wife even if it is the result of adultery. The male's need for an heir is thus provided for--and since infertility is never attributed to the male (!) and since it is believed that somewhere there is a woman by whom he can have children, adoption in Islamic society is not perceived as "necessary." It also seems quite clear that in all three major religions the faith is more important than the family. Thus, contrary to the commonly held view that adoption in western culture is an outgrowth of the concept of Christian charity, it would appear that historically adoption in western society has grown only as religious belief has declined.[8]

Unlike the law of the ancient Hebrews, modern Israeli law does recognize adoption for Jews. However, in Judaism Jewishness is passed on through the mother (i.e., the child of a Jewish mother is Jewish regardless of the father's religion). Since non-Jews cannot have an Orthodox marriage nor participate in other church rituals, adoption in Jewish society even today can create special problems.

Christian countries continue to use adoption laws inherited from a variety of other sources, and the Church has tended simply to adapt to the process by imposing various restrictions concerning the practice of allowing children to be adopted by those of another religion or sect. If we look specifically to the Roman Catholic Church, we soon discover that because of the Church's traditional opposition to birth control, there have often been many Catholic babies available for adoption and few Catholics who wanted to add to their own already large families. Nevertheless, the Catholic Church has preferred to keep children in Catholic institutions (orphanages, receiving homes, etc.) rather than permit adoption to persons of another religious faith. In Benet's words: "Social workers say that if a child has a secure family, he doesn't need much else, and without that, it doesn't matter what else he has. Catholics seem to attach the same importance to the faith; the two notions continue to co-exist uneasily."[9]

It would appear that recruitment to the Church has always been the prevailing idea behind the various Catholic attitudes towards adoption:

> The early Christians, as an embattled minority, were more interested in conversion and recruitment than in founding personal dynasties; the radical separation between the Church and the

> societies around it, the disregard of material property (...), the belief in immortality--all worked against the establishment of mechanisms of personal continuity like adoption.[10]

Of course the Christian Church developed within the established society of the Roman Empire. Rome's laws and customs were directly linked to both the Babylonians and the Greeks, and adoption was always a part of Roman society. Ancestor cults were traditional in Rome; and in return for the land he inherited through adoption, the adoptee "tended the cult."

However, a major problem encountered by Roman law as it attempted to incorporate the practice of adoption was that of reconciling the concept of adoption with the concept of the total power of the paterfamilias. If such a power was truly unalienable and irrevocable, how could anyone ever be "adopted" into a second family? The Roman solution (a solution still used in many countries which trace their legal systems back to the Romans--France, for example) was a two-level system of adoption which by the time of the Emperor Justinian (of the Justinian Code) had been well worked out.

Roman adoption thus took two possible forms: adoptio (simple adoption) in the sense we tend to understand the word today, a practice which applied to children under the patria potestas, and

adrogatio (full adoption), a procedure which applied only to those persons who were sui juris.[11] If such a full adoption (or adrogation) took place, the adoptee and all his descendants belonged to the new family. His former ancestor cult was destroyed by the act of adrogation, and he accordingly worshipped new ancestors.

> Adrogatio destroyed a family and thus was allowed only to save another, i.e. to provide a heres...It was allowed only as a last resort, to save a family, and no one might adrogate more than one, or any, if he had a child already. He must be 60 or from some cause unlikely to have children.[12]

Under Roman law a minor sui juris (an orphan of unknown parentage, for example) could not be adrogated since he would automatically have guardians (tutores); and it was felt that such guardians had to be prevented from abusing their power by adopting their wards in order to appropriate family wealth.

Adoptio, or simple adoption, by contrast, was permissible even to someone who already had heirs; and in the practice of adoptio the adoptee could be alieni juris. However, in order to break the power (potestas) of the paterfamilias over the potential adoptee, there had to be a kind of triple renunciation.

> The elaborate form [of the renunciation] is derived from a rule of the XII Tables (...) which provided that if a father sold a son three times the son should be free from potestas. The potestas being in principle indestructible, the rule was seized on as a means of ending it at will. The transaction had two parts, a preliminary sale or sales to destroy the potestas and the act of adoption, the claim and declaration in court.[13]

This two-step procedure for dealing with the perceived problem of inalienable parental status, which involves making the termination of parental rights a separate and distinct operation from the act of adoption itself, is one of our direct inheritances from the Romans in modern adoption law.

Justinian called this "simple" form of adoption adoptio minus plena, and it was used in a variety of situations. A father might sell a child if he already had more children than he could support, or he might adopt a child into his natural family in order to cut out from inheritance a natural child he considered "unsatisfactory." He could even legitimate a child born of his concubine through a simple adoptio minus plena. If a family was poor, parents might try to improve their children's status by having them "adopted up"; rich

families indeed tended to accumulate dependents in this way.

Some historians contrast Roman adoption law with so-called "modern" adoption law by insisting that full adoption was only permissible to provide an heir for the childless. However, as we have seen, this was the case only for adrogation. Ordinary (or simple) adoption could take place for any number of reasons. And despite a rather meandering course through history, modern adoption law in western societies is derived almost solely from adoption law as practiced in Rome.

In summary, it would seem important to note two very significant elements of early adoptions--first, the universal emphasis on the welfare of the adopter's family rather than on any benefits to be enjoyed by the adoptee; and second, the religious and spiritual emphasis which is the foundation of the practice and which once again clearly focuses on the benefits to the family of the adopter and not on the welfare of the adoptee, nor even with any reference to an adoptee's prior religious convictions or beliefs.

When we turn to English common law and its inordinately high regard for blood lineage, it seems fairly easy to comprehend why the practice of adoption never really acquired a foothold there. Obviously even the earliest examples of adoption practice required the adoptee to become a member of the adopter's family, thereby

receiving a quasi-interest in the adopter's property during his lifetime, and quite often full rights of succession to the family property upon the death of the adopter. But in English law heirs were clearly defined as legitimate children who were heirs of the blood: "he is only heire which succeedeth by right of blood."[14] Thus the English common law "knew nothing" of adoption. Adoption in England, in the Roman sense of the term, was not possible until the passage of the Adoption of Children Act of 1926.[15]

Indeed for a direct line of statutory parentage in matters relating to adoption, Canadian legal history must look to the United States.

The absence of common-law precedent from England undoubtedly hindered the development of adoption in the United States, yet there was a very strong influence there from two other sources, Spanish and French law, which had acquired very strong positions in Texas and Louisiana respectively. Since French and Spanish jurisprudence largely followed Roman civil law (which had subsisted in metropolitan France and Spain and was duly "received" by the respective colonies/territories in North America), and since adoption had long been a well-established practice within the Roman system, it gradually entered American jurisprudence, too.

But in virtually all early American cases regarding the concept of "adoption," state courts ruled that since adoption was unknown to

the common law, they were powerless to deal with the matter until the legislature had seen fit to enact the appropriate enabling statutes. Once this was done, case reports habitually rely extensively on principles of Roman Law and tacitly incorporate the substantive effects of Roman law into the American statutory provisions.[17] As Huard points out, "In this roundabout way a very ancient practice finally acquired an honorable estate in the new world."[18]

The earliest American adoption statute is variously reported as that of Mississippi in 1846[19] or that of Massachusetts in 1851.[20] But whichever statute is taken to be the first, the real importance of the legislation is its increased concern for the welfare of the neglected and/or dependent children who were to be the eventual adoptees under the statutory procedures set out within. The primary concern in adoption law became, in the American system, the welfare of the child rather than concern for the continuity (property-wise or in a religious sense) of the welfare of the adopter's family.

During the years prior to the passage of the first American adoption legislation, "adoption" in the United States still did retain, however, to some extent, the idea that the practice was meant as a helpful measure for adults. Since the nation was populated mostly by farmers, adopting children was sometimes seen as simply another way of getting cheap labor.

In Europe during the same period (the first half of the nineteenth century), orphans or abandoned children often lived in institutions--alms-houses (poorhouses), orphanages, even jails. Large numbers were shipped off to North America as apprentices or indentured servants, living as members of families but retaining their original names. Legal contracts often specified the amount of time the children were to live with their new families, at the end of which period they would be free to live independently. Many of them simply ran away. Since no adoption laws existed in North America to protect children's rights, natural parents were free to make (were indeed required to make) all decisions regarding the care of their children. When parents chose not to raise children born to them or when they, for some other reason, could not care for them, informal arrangements (de facto adoptions, unrecognized by law) with friends or relatives were often made to ensure their care. However, the primary method for caring for children without families even in the United States until the mid-century mark was institutional placement. Although institutions did provide basic physical and custodial care as well as some rudimentary education, children cared for in this way were often deprived of any sort of normal family life. In urban areas (Boston, New York City), many homeless children roamed the streets unattended--a sitution which prompted many early pioneers in the field of child welfare to become seriously concerned about the lack of homes for children like these. Thus came about the impetus for adoption legislation in the United States based on the concept of

the welfare or "best interests" of the child.

The first Massachusetts adoption law, a statute which appears to be surprisingly uncomplicated when compared to contemporary adoption legislation, required a joint petition by the adopting parents to the probate judge as well as the written consent of the child's natural parents, if living, or his guardian's or next friend's, if the parents were deceased. If the judge was satisfied that the adoption was "fit and proper," he could enter the adoption order. The Massachusetts law remained unchanged (except for minor revisions) from 1851 until 1923, when the legislature authorized the judge to appoint a guardian ad litem to investigate the facts in any adoption case and report to the court prior to the granting of a final order.[21]

Indeed most of the early American statutes based on the Massachusetts model had the following points in common: (1) a consent to the adoption by the natural parents; (2) a joint agreement by the proposed adopters to accept the child into their family; (3) a judicial determination that the adoption was "fit and proper;" and (4) a complete and permanent separation of the child from the natural parents.[22]

Yet other early adoption statutes were intended merely to provide evidence of the legal transfer of a child by the natural parents to

another party, and provision of a public record of the transfer (similar to the filing of a Duplicate Certificate of Title at the Land Titles Office) was all that was considered necessary. Gradually, as evidence accumulated that many parents and even some agencies were willing to have children adopted by persons wholly unsuitable or even unscrupulous, a more sophisticated legislative "machinery" for investigating all adoptions was put into place.[23]

English visitors to the United States at this time were amazed at "how easily families absorbed indigent relatives, let alone totally unrelated children."[24] Their amazement probably serves to point out just how unresponsive to this same need English social structure had become. For although democracy had spread on the European continent (mainly as a result of the French Revolution) and the revival of Roman law had aided a rebirth of adoption in continental Europe, in England the importance of blood ties, primogeniture, and inheritance through entail had continued unabated. Benet suggests that North America's ability to carry on and foster a system of adoption in the nineteenth century as opposed to England's marked resistance is attributable to North American's more fluid social system, an underpopulated country, and a democratic belief that man creates his own place in the world and is not simply born into his rank.[25]

> Conditions [in America] facilitated adoption. "One blessed custom they have in America," wrote

> an English visitor in 1848, "resulting from the abundance which they enjoy; a man dies, his widow and children are objects of peculiar care to the surviving branches of his family; the mother dies --her orphans find a home among her friends and relatives." Another visitor in a work published in 1852 said: "Observing how easily and frankly children are adopted in the United States, how pleasantly the scheme goes on, and how little of the wormwood of domestic jealousies, or the fretting prickle of neighbour's criticisms seem to interfere with it, one is led to enquire why the benevolent practice is so common there.(...) The facility with which enough, and more than enough, is found to satisfy every hungry mouth on a farm, gives wonderful scope to the benevolet sentiment.(...) A fresh hand growing up is valuable to the sons of labour, who are quite as willing to adopt a child as the wealthy.[26]

Of course, as mentioned above, things were not so uniformly rosy in the United States, yet North America seemed to have broken free of the Tudor Poor Law legacy much sooner than the English.

As codified in England in 1834, the principles of poor relief were

(1) loss of personal reputation (the stigma of pauperism); (2) loss of personal freedom (detention in the workhouse); and (3) loss of political freedom (disenfranchisement).[27] Christian morality decreed that parents (one could perhaps say "poor parents" especially) should be held strictly responsible for their children's welfare. Bearing an illegitimate child was a criminal offence, and a mother could not leave the child in the care of the authorities without coming under their jurisdiction herself; thus either prison or the workhouse was her lot: "The basic idea was to keep the poor rate low, which resulted in a system based on deterring those in need from using it."[28] Children were removed from their mothers at the age of three, boarded out with foster families, or institutionalized. Although, as we know, there was no legal adoption, kinship fostering was common since many families tended to take in "one of their own" rather than see that relative in the workhouse.

When the workhouses became too full (as they did in economically depressed imes), apprenticeship was one way to "foster out" older children. Other, more drastic alternatives included the army, navy or merchant marine--or as previously noted, emigration as an indentured servant to the United States. De facto adoption was also known, of course, and even met with the consent, if not the approval, of the Poor Law guardians: "English officials found it difficult to believe that there could be any relationship unless money was being paid for the child's keep."[29] Thus, since the idea of adoption for

the English bureaucracy seems to have represented one way of condoning immorality, since neither the Church nor the Poor Law authorities had ever encouraged it, and since for the wealthy it represented a serious threat to the English law of inheritance, adoption with legal status continued to lag behind developments on the European continent and in North America.

In Canada, however, since social conditions in the nineteenth century more closely resembled those of the United States, we looked to American legislation in order to draft our own adoption statutes.

The first Canadian adoption statute was passed by the Province of New Brunswick in 1873.[30] Following the broad general outlines of the 1851 Massachusetts law, it allowed any adult unmarried person or a husband and wife jointly to petition the Provincial Supreme Court in Equity for adoption of a child. Required consents included that of the child himself (if he was over 12 years of age) and that of his natural parents (if living) or of the child's guardians (if the natural parents were deceased). The judge had to be both satisfied that the petitioners could "bring up and educate the child properly" and convinced of the "fitness and propriety" of the proposed adoption. As MacDonald points out, "Notably absent in this first Canadian adoption statute was any reference to secrecy of adoption records, an adoption probation period, or the requirement of a report to the court from a public official on the suitability of the

petitioners as adoptive parents.[31]

A more elaborate adoption statute was passed by Nova Scotia in 1896, but then some 25 years elapsed before further adoption legislation was enacted in British Columbia (1920), Ontario (1921), Manitoba and Saskatchewan (both 1922), Quebec (1924), Alberta (1927), and Prince Edward Island (1930).[32]

British Columbia's 1920 Adoption Act[33] was similar in several ways to the New Brunswick statute of 1873. Like the earlier statute, there was no provision that adoption records be kept secret, nor was any report on the fitness of the prospective adopters required to be placed before the court. A notice requirement did appear for the first time in Canadian jurisdictions with the notice of application for adoption required to be served on the Superintendent of Neglected Children. One unique feature, abandoned during the 1930's but presumably derived from legislation then current in several American jurisdictions, was the provision that the provincial secretary could issue a certificate of adoption where there had been a prior agreement under seal executed by the child's natural parents for his adoption.

Manitoba's legislative provisions relating to adoption, interestingly enough, were from the beginning included in an umbrella statute concerning the general area of child welfare. The Manitoba Child

Welfare Act of 1922[34] was unique among early Canadian adoption statutes in the powers granted to the provincial Director of Child Welfare. If one wished to adopt a child, one first applied to the Director, who then had the authority to issue or refuse to issue a "certificate of adoption." After receiving a certificate of adoption, the adopting parents were then required to report regularly to an agent of the Director (a social worker) for a period of one full year. After the year of supervised placement, the prospective adopters could apply to a judge of the County Court for a decree absolute of adoption. And if at that hearing the decree was granted, the parents by adoption were no longer required to report to the social worker and were granted "every parental right pertaining to natural parents."[35] For the first time, too, legislation provided that the provincial Director of Child Welfare would be responsible for ensuring that records relating to adoption or to an adopted child were sealed and secured and not open for inspection without the Director's permission.

British Columbia's and Manitoba's earliest adoption statutes contain features which are unique to those jurisdictions. However, Ontario's Adoption Act of 1921[36], along with its successor statute passed in 1927[37], were to provide the essential features which would characterize Canadian adoption legislation and Canadian adoption practice until the post-war period.

According to this "model" statute, adoption had as a legal effect the divesting of the natural parents of all legal rights and duties in relation to the child as well as creating a new legal relationship of parent and child between the adopters and the adoptee (the now totally commonplace statutory death and rebirth of the adopted child). The adopted child had the right of inheritance from both his adoptive parents and their descendants but not from any other kindred of the adopting parents. The adoptee also retained the right to inherit from his natural parents. Explicit provision was made for a report to the court by a Provincial Officer on the suitability of the prospective adoptive parents, and there was further provision for an adoption probationary period of two full years (a period, however, which could be shortened or waived on the recommendation of the Provincial Officer). The 1927 Act required the sealing of all adoption papers; the files could not be opened save on the order of a judge or with the express permission of the Provincial Officer. A judge, prior to making an order for adoption, was required to satisfy himself that the parent signing the adoption consent understood that its effect was to permanently deprive the parent of all parental rights in relation to the child. He was further required to be assured that no payment had been made or would be made as consideration for facilitating the adoption.

Since the Second World War, most Canadian statutes dealing with adoption have undergone amendment, and today they reflect changed

views of what the function of adoption is or ought to be in contemporary society. We shall not undertake an exhaustive review of these legislative changes at this time but shall reserve them for discussion in later chapters as we discuss the various central issues confronted by adoption legislation since the 1940's.

To return briefly to England, however, during the first half of the twentieth century, we find there that, according to Kornitzer, the First World War had raised the illegitimacy rate considerably and that the problem of orphans and unwanted children was beginning to assume alarming proportions. Apparently the old methods of dealing with such children had almost completely broken down.[38] As previously mentioned, however, English courts had already held that parental rights and liabilities were simply not transferable. Even as late as 1901, Stirling, L.J., in Humphrys v. Polak[39] had held that a contract between the mother of an illegitimate child and another person for the transfer of the mother's parental rights was unenforceable. Yet thanks to the diligent efforts of the National Children Adoption Association and the National Adoption Society as well as two Parliamentary committees (the Hopkinson and the Tomlin), the first English adoption statute was finally passed in 1926. The 1926 Act was amended extensively in the light of subsequent experience and criticisms, and all earlier legislation was repealed and the law consolidated by the Adoption Act of 1958. In 1969, further dissatisfaction with various aspects of the law and procedure led to the

appointment of the Houghton/Stockdale Committee whose report was published in 1972. Most of this Committee's recommendations were incorporated into the Children's Act of 1975. Current adoption procedure in England is governed generally by rules made pursuant to the Children's Act of 1975. We shall have occasion to make further reference to the English statute in our discussion of questions of custody and access as they relate to adoption.

Now that we have seen the general evolution of the adoption process from ancient to modern times and have seen how adoption came to Canadian jurisdictions, we can perhaps more readily see adoption as a complex social and legal institution, one which reflects many of the prevailing values of any society in which it is practiced. Canadian legislation during the first half of the twentieth century attempted to regulate the process with a view to attaining two primary goals: (1) the promotion of the welfare (or "best interests") of adopted children in part through the removal of the stigma attached to bastardy or illegitimacy; and (2) the clarification of the legal relationship of the adopted child to both the natural parents and the legal (adoptive) parents, thus making the rights of succession to property more certain.[40] However, when we attempt to discover just how many children were actually affected by (or benefitted from) these legislative measures, our task becomes more difficult, if not impossible.

There has never been in Canada any kind of consistent, comparable reporting of adoption statistics to a central data bank; and according to one recent researcher, "There are gaps, there are estimates, and one must frequently rely on general impressions."[41] It is almost impossible to obtain the same data from each province, and there are wide variations in the way records are kept and statistics recorded (fiscal year versus calendar year, number of completions versus number of placements, etc.) However, Hepworth's 1980 study does indicate that there are some systematically reported statistics for the period post-1959.

In 1959 Canada had the largest number of infants under the age of one year it had ever had (479,000). By 1974 it had its largest number of children 10-14 years old: "The entire group under 15 years of age reached a peak in 1966; in 1975 they had dropped back slightly to the 1960 level."[42] These numbers, which indicate the proportion of children of various ages within the general population, are significant when one then examines the numbers relating to adoption.

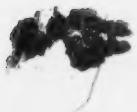
Of course another relevant factor is the number of children "in care" at any given period of time. Hepworth's figure for children in care during the 1930's, for example, is approximately 40,000. When this figure is compared to the 100,000 children in care during the period 1959-1969, it is evident that the adoption pool in Canada had increased substantially.[43] The make-up of the pool, however, has

changed over time.

Hepworth found that the highest number of Canadian adoptions completed in one year (1970-71) coincided with the peak year for illegitimate births. Agency placements in all provinces reached their peak in absolute numbers in the late 1960's and early 1970's. In 1959-60, 12,800 adoptions were completed; in 1969-70, 20,300 were completed. Health and Welfare Canada unpublished statistics for 1978 report some 14,800 completed adoptions.[44]

During the period betweeen 1939 and 1979 there was also a rise in the number of so-called non-ward (relative) adoptions throughout Canada. For the five provinces reporting relative adoptions as a separate category (Quebec, Ontario, Manitoba, Saskatchewan, and British Columbia), these represented over half the 1978 adoptions completed (55%).[45]

> Agency placements as a percentage of all adoption placements peaked at different times during the 1960's in the various provinces. Since then, adoption by relatives and especially by step-parents, have reached their peaks in most provinces during the mid-1970's both in terms of absolute members and as a proportion of completed adoptions and may still be rising.[46]



According to Hepworth's findings, in recent years private or third-party adoptions have accounted for 10% of completed adoptions in Ontario and Quebec and an even smaller percentage in most other provinces. Combined figures for Quebec, Ontario, Manitoba, Saskatchewan, and British Columbia in March, 1979, indicate that private placements accounted for 12% of the total number of adoptions.[47]

Obviously we are still continuing to see an increase in the number of relative adoptions--a trend which we can expect to continue so long as the divorce rate continues to climb and so long as unmarried parents continue the current trend of keeping their babies rather than surrendering them for adoption. Private (third-party) adoptions currently remain in a kind of limbo with most current provincial legislation designed to exert stronger control over them and in effect to minimize their numbers. The entire question of private (or grey market) adoption will be discussed later in greater detail.

In general, the characteristics of children being adopted in Canada today have also shifted but only slightly during the years since World War II. Normally the consistent statistic is that more boys than girls are available for adoption but that girls are adopted more readily; it also appears that in the case of adoption by relatives there is a bias towards relatives preferring to adopt girls rather than boys. This "constant" is also reflected in statistics from the

Adoption Desk of Health and Welfare Canada.[48] Characteristic categories of children who wait longest for adoption include: older children, sibling groups, children with mental or physical handicaps, children who have experienced neglect, abuse, or deprivation, and children of minority racial groups--particularly native or Metis children (even if they are pre-school age). However, despite the eternal preference for a white, Anglo-Saxon newborn (a constant reported by virtually every agency in Canada), it is also true that currently many more "hard-to-place" children (older children, sibling groups, children with special needs) are finding adoptive homes in Canada.

When we look specifically to minority children as adoptees, we find that placement practice has come full circle in the past fifty years. Forty years ago when it was common for families to be "matched" with adoptees (matched as to physical characteristics, race, religion, etc.), transracial placement was virtually unknown in this country. According to Lipman, the first placement of a black child in a white family did not occur until 1952 in Ontario. Another placement occurred almost simultaneously in British Columbia, and there were three in Montreal in 1959. Yet not until the 1960's did any active recruiting take place for minority race children.[49] Margaret Ward, in a forthcoming book on native adoption in Canada, indicates that by 1971, however, there had been such special efforts in many parts of Canada to find adoptive homes for minority race children. Yet even

programs aimed wholly or partially at possible native applicants (such as AIM--Adoption Indian and Me'tis) succeeded in attracting only white applicants. Thus interracial adoptions became increasingly common.[50]

However, in 1971 a movement in the United States began to promote the placement of native children with native families and in 1972 the National Association of Black Social Workers issued a policy statement condemning adoptive placement of black children in white homes. So at the very moment Canada was beginning to accept transracial adoption, the theory emerged that this kind of placement was not in the best interests of the child.

It is true that in addition to arguments raised by the American blacks and Canadian native peoples over the course of the last fifteen years there have also been serious questions raised about racial identity by social work professionals as well as psychologists and sociologists. In 1977 the Task Force on Canadian Native Peoples' Mental Health recommended that blood relatives, band members, and members of the same Indian nation should be the preferred placement for a native child.[51] This recommendation was endorsed by the Canadian Psychiatric Association and followed, too, the 1975 report of the British Columbia Royal Commission on Family Law, which strongly advocated the placement of native children in native homes.[52] We shall discuss other ramifications regarding Indian and

Inuit adoptions in Chapter IV.

Other observable trends in adoption in Canada today include the changing position of adoption subsidies available to those adoptive parents who are willing to adopt a child with special needs. Obviously what constitutes "special need" may vary from province to province, and the place of adoption subsidies varies as these relate to the degree of sophistication found in the provincial adoption services, as well as the population density and other social and economic factors. The possibility of subsidies and indeed the whole question of money as it relates to the practice of adoption will be discussed in much greater detail in Chapter IV. It seems clear, however, that in the future we shall see an increase in this area in Canada; for as Elizabeth Cole has stated: "It is demonstrable that of all forms of substitute child care in child welfare services, adoption is the most cost-efficient...Better adoption subsidy programs can result in (...) social and cost benefits."[53]

Further noticeable trends in Canadian adoption concern the increasing controversy surrounding the question of access to identifying information by the adult adoptee (or indeed by the natural parent), the increasing importance of adoptive parent groups and adoptee groups as they exercise a kind of consumer-watchdog function, the growing concern of the Canadian public regarding so-called grey market (even black market) adoption practices, and the increasing

legal complications surrounding, for example, the rights of putative fathers and the role of adoption as it relates to such biotech medical processes as artificial insemination and surrogate motherhood.

However, before we move on to a more detailed analysis of the preliminary steps required before a Canadian judge may grant an order for adoption, we should perhaps spend a brief moment noting the principles, values, and assumptions upon which, arguably, all our current adoption legislation rests.

As Kadushin has indicated, guidelines for adoption represent (in western industrialized societies) a general consensus based on the results of "practice wisdom, national values and philosophy, and a modest amount of empirical research."[54] Two principal codifications of these guidelines are to be found in the Child Welfare League of America's Standards for Adoption Services[55] and in the United Nations report from its European Seminar on Inter-Country Adoptions.[56] Their major points have been combined and summarized by Kadushin as follows:

> 1. That the first, best place for the child is with his own family, in his own community, in his own country; that adoption is not appropriate unless all efforts have been made to salvage his

family for the child. Adoption is always in substitution of the original, biological home and should not be employed unless it is clear that the child's own family is not likely to be able to provide the care the child needs and is rightfully entitled to.

This would suggest that family welfare is the best child welfare and that the community is obligated to provide the family with those resources and services that would enable the family to maintain the child at home.

2. If substitute care is needed, the first efforts should be made to find such a home in the child's own racial, national, ethnic, and religious community. Only if it is clear that such resources are not available should the effort be made to find an adoptive home outside the child's community.

3. That the primary purpose of adoption is to provide a permanent family for children who cannot be cared for by their own biological parents. Therefore, the child's welfare, her

needs, and her interests are the basic determinants of good adoption practice. Homes should be selected for children, rather than children selected for homes.

4. That adoption is the most desirable form of permanent substitute care where this is the necessary alternative to the child's own family. It is a more securely permanent arrangement than the foster family home. It is more likely to provide the necessary long-term stability and continuity of affectionate, intimate care by the same parent than either the foster family home or an institution.

5. That adoption should be made available to every child who needs it and can use the service, without regard to age, religion, race, sibling relationship, or mental, emotional, or physical handicap that does not preclude the child's living in a family and the general community. In order to make use of the service, the child needs to be legally freed for adoption.

Acceptance of the concept that adoption should be

provided for every child who can make use of the service rules out as a guideline in adoption matching adopters and adoptee so as to imitate nature as closely as possible. Matching is not possible when older, transracial, or transethnic adoptions need to be made if adoptive homes are to be provided for the children.

6. That the welfare of the child requires that a decision regarding the need for permanent substitute care be made as early as possible and implemented with a minimum of delay and uncertainty, and that finality in adoption be achieved as soon as possible, with due regard, however, for other, countervailing considerations.

7. That all parties to the adoption event--the biological mother and father, the adoptive parents, and the child, at an appropriate age--should be offered the opportunity of a reasoned consideration of alternatives to adoption and help in implementing these alternatives of choice. If adoption is the considered option of choice, help should be provided in clarifying the implications of this decision, in

considering anticipated problems, and in preparation for implementing the decision. All steps taken in the process of initiating, implementing, and terminating adoption procedures should be in accordance with due process procedures that provide adequate protection to all parties in the transaction.

Once adoption is legally finalized, adoptive parents take their place in the community of parents indistinguishable from biological parents. Full acceptance by the community of the idea of adoption implies that the adoptive families are not perceived differently or accorded treatment different from that accorded other families.

8. That in providing such opportunities for reflective and considered decision making, there should be some interposition of delays between the decision to surrender the child and actual legal surrender and between the placement of the child for adoption and the actual legal consummation of adoption.

9. That adoption invariably severs the relationship between biological parent and adoptive child and that adoptive parents and child assume all of the reciprocal rights and obligations of the biological parent-child relationship. In support of this, confidentiality and anonymity regarding the identity of the biological parents and the adoptive parents is safeguarded. The agency should provide the adoptive parents with all the nonidentifying information it has available about the child and his background that might be helpful to them in developing a positive relationship with the child.

10. That adoption is a long-time process and that the community is responsible for offering assistance throughout the process. Consequently, postplacement service is as necessary and desirable as preplacement service. Service to the biological parent, the child, and the adopters should be comprehensive, integrated, and characterized by continuity. While primarily a social work function and responsibility, adoption has significant medical and legal implications, and consequently a comprehensive program of

services in adoption requires integrated, collaborative activity with other professions.

11. That the community has a concern with adoption in discharging its responsibility to the child. This responsibility is mandated to the social agency that is sanctioned to act in behalf of the community. The charge to the agency in implementing this mandate is to identify children needing adoption and help free them for adoption, to recruit parents for children needing adoption, to assess carefully the suitability of adoption applicants, to select a particular home for a particular child, and to assist the adoptive family in making a success of the placement.

Selection of adoptive parents for children should be on the basis of clear, empirically defensible criteria that are shared with the applicant. In implementing the tasks of recruiting, assessing, and selecting applicants, the emphasis should be on maximizing applicant's potential for adoption rather than on investigation and elimination.

That, further, the community has a responsibility

> to safeguard the child from the risks attendant on adoption engaged in for financial gain or other considerations potentially harmful to the child's development.
>
> 12. In implementing this concern, some attention needs to be given to developing a trained professional cadre of social workers with a specialized knowledge of and skill in adoption practice. The community has the responsibility of providing such workers with a sufficiency of resources, in terms of both variety and adequacy, and with a limited caseload that would enable them to offer executive service.[57]

We note with Kadushin that the above-listed principles have a "nice ring of finality" to them suggesting that they have considerable support validated by research and would thus not be subject to modification. However, such is obviously not the case (as we shall see as we begin to examine Canadian adoption law more closely). It will soon become evident that such "principles" are often the result of "compromises between the conflicting interests of the various parties in the transaction, the political power of the various parties in the transaction, and the changing ratio of applicants to children available for adoption."[58] To implement (through legisla-

tion, through governmental regulations made pursuant to legislative authority) these principles, legislators must constantly attempt a judicious balancing of the conflicing needs, rights, and desires of the different parties in the adoptive relationship. Indeed to the traditional adoption "triangle" of biological parent--child--adoptive parent, we might well add government itself and thus speak more readily of an adoption "rectangle." Quite obviously, giving priority to one guideline often involves modifying another--so that in the end one is left with a deep sense of conflict, confusion, and contradiction about these accepted guidelines, a sentiment which is underscored when we examine the problems which have arisen pursuant to Canadian adoption legislation.

Hughes has also pointed out that adoption is only one element of a comprehensive child care program in the various provinces, a program based on the following principles: (a) the family unit is the best unit for the socialization of the child; (b) the natural family should be maintained through comprehensive social services in order that it can keep its children; (c) the natural family whenever possible should be strengthened and stabilized through comprehensive social services so that children, if temporarily removed, can be reunited with their parents; and (d) when the natural family cannot be maintained or sufficiently strengthened and stabilized, the child should be placed as a permanent member of another family unit.[59]

We obviously wish to keep a child in his original family unit whenever possible; but when adoption is chosen as the "best alternative" for him (when his original family unit is irrevocably destroyed), it is the welfare of the child himself, and not the welfare of the adults involved (be they the natural parents or the adoptive parents) which is to be the yardstick by which the judge should ultimately decide the issue.

As Hughes further points out, however, adoption will not always be permitted even if demonstrably in the best interests of the child. Canadian courts have repeatedly emphasized the fact that adoption did not exist at common law and that it exists today in purely statutory form. And since it is such a very serious proceeding, the statutes are always strictly construed.[60]

> [T]he right of adoption, the right to change a child's status, the right to change its heritage, is not...a right which depends on the welfare of the child but depends on the strict wording of the statute, because apart from the statutes no such right exists.[61]

> In order to deprive a subject of a fundamental constitutional right the language of a statute must be clear, direct and unequivocal. Such a

> right cannot be taken away by implication from the language used. Such a statute should be strictly construed.[62]

Since on adoption all the child's ties with his natural parents are forever severed, adoption "cannot be considered by the courts as a means of furthering the welfare of the child until the natural parent's rights in the child either have been surrendered voluntarily or have been forfeited through parental misconduct.[63] As mentioned in our earlier discussion, this two-step process, which is fundamental to all Canadian adoption law, is a direct inheritance from Roman law.

Thus we have examined some of the different guiding principles and assumptions which form the foundation of the Canadian law of adoption. We have noted that while in times past adoption primarily served the interest of the adopter (in perpetuating his name or family fortune), modern adoption has as its principal objective the providing of a secure family environment for children who cannot live with their original parents. The protection of that child's best interests is the paramount goal in the adoption process. The difficulty is that, of course, other interests are almost always involved--including those of the natural parents, the adoptive parents, various possible third party de facto parents (foster parents, grandparents, or other relatives) and the intermediaries

(social agencies, private agencies, or private facilitators such as physicians or even lawyers). Since there are almost always conflicts among these other, theoretically peripheral, interests, we sometimes find courts concentrating on resolving those conflicts and then declaring such a resolution necessarily to be in the best interests of the child, which, of course, is not always the case. According to one American authority, there is "an ambivalence toward the articulated goal of furthering the child's welfare" which is "evidenced by the major concessions made both to natural parents...and to adoptive parents,"[64] as well as by concessions made to the administrative goals (usually economic) of adoption agencies.[65]

Adoption, to be a viable social process, must in some way serve the interests of the adoptive parents--otherwise, homes would never be offered to parentless children in need of a family. However, it is also clear that if the adoption is sought by the adopters primarily in order to satisfy their needs (today usually psychological rather than economic ones) rather than the child's, then a conflict may arise. If after the child has become integrated into the family (following preliminary placement) the adopting family attempts to abandon the process, there are further problems.

The third interest in the adoption triangle after that of the child and the adoptive parents is, of course, that of the natural parents. In the "perfect" adoption scenario, the need or desire of the

biological parent to be free from the burden (economic or social) of being a parent, the desire of the adoptive parents to add a child to their own family unit, and the child's need for the environment provided by that particular home all coincide and complement each other. But very often (as we shall see again and again in the reported cases on adoption in Canada) the natural parent's interest is manifested in precisely the opposite manner: he or she quite frequently does not want the adoption to take place. Or, if it has already transpired, the natural parent is seeking to undo the entire process. Often both parental interests appear in succession: first the child is placed or surrendered for adoption because the parent feels unable to assume parental responsibility for the child; later, however, the same parent either attempts to revoke his/her "preliminary" relinquishing of parental rights or refuses to consent to the adoption of the child by others. This kind of indecisiveness combined with an insistence on the primacy of parental rights (and parental love) may exist even in situations where failure to shoulder the concomitant parental responsibilities makes the parent's position completely unrealistic.[66]

If the interest of the child's natural father and his natural mother diverge, as in the case following divorce when the custodial parent and his/her spouse attempt to take the child into the second family by adoption while the other parent insists on his/her right to veto the move, the complications become nightmarish. If the natural

parents have never married, the mother has traditionally been given sole authority to make decisions regarding her illegitimate child. Yet the role of the putative father in various child-welfare proceedings--and the rights of a putative father to have some say regarding the welfare of his child--would appear to be pushing the law into a greater acceptance of the idea that the putative father, too, has a role, even if a minor one, in the adoption process.[67]

Another competing interest in the adoption process includes so-called de facto parents such as relatives, friends, or foster parents with whom the prospective adoptee has perhaps lived for some time. Whether the foster relationship has been created informally (for example, by the parents' simply arranging to leave the child with the foster family) or formally (through an agency or as a result of court proceedings), it is quite often the case that the "temporary" parents oppose adoption by any other third party either because they wish the status quo arrangement to continue or because they themselves wish to be the adoptive parents.

Finally, especially in the world of private third-party adoption, we find the interests of go-betweens such as doctors or lawyers--who may often be pursuing aims of their own rather than concentrating on the best interests of the child.

As we can readily surmise, there is a danger that in the interplay of

all the above-mentioned interests, which seem at times to be mutually exclusive and totally divergent, the child's interest may be crowded out so that he becomes a victim of the adoption process rather than its beneficiary. The child may end up in a home which is cold and uncaring; he may be taken away from a home which to him represents love and security; he may be forced to wait and remain unsure of his ultimate "home" for an indefinite period of time--something which not many children can tolerate without some damage to personality or emotional growth.[68]

The role of adoption law, then, is to prevent this undesirable result; it must prescribe legal safeguards which will assure that foremost consideration be given to the child himself when other interests collide with each other and with the child's welfare.

NOTES

[1] Sir Henry Maine, Ancient Law (London: J. Murray, 1908), p. 130.

[2] Leo Albert Huard, "The Law of Adoption: Ancient and Modern" 9 Vanderbilt Law Review (1955-56), p. 743.

[3] Mary Kathleen Benet, The Character of Adoption (London: Jonathan Cape, 1976), p. 23.

[4] Kocourek and Wigmore, Evolution of Law, Sources of Ancient and Primitive Law, p. 344.

[5] Ibid., p. 426.

[6] G.R. Driver and J.C. Miles, The Babylonian Laws (London: Oxford University Press, 1955), vol. I, Legal Commentary (1952), p. 102.

[7] Exodus 2:10 (Douay Version).

[8] Benet, op. cit., p. 28.

[9] Ibid., p. 29.

[10] Ibid.

[11] I. Colquhuon, A Summary of the Roman Civil Law (1849).

[12] W.W. Buckland, A Text-Book of Roman Law (London: Cambridge University Press, 1963), p. 189.

[13] Ibid.

[14] Pollack and Maitland, The History of English Law (Cambridge: Cambridge University Press, 1968.) Reprint of 1898 Edition.

[15] 16 & 17 Geo. 5, c. 29; 17 Halsbury Laws of England ss. 1406-23 (2d ed. 1935).

[16] See, for example, the reported cases of Fuselier v. Masse, 4 La. 423 (1823); Vidal v. Commagère, 13 La. Ann. 516 (1858); Teal v. Sevier, 26 Tex. 516, 521 (1863), all of which refer to "Roman-style" adoption in Louisiana and Texas prior to the practice's general acceptance in other parts of the United States.

[17] See, for example, the classic cases of Ross v. Ross, 129 Mass. 243, 262 (1878); Hockaday v. Lynn, 200 Mo. 456, 461 98 S.W. 585, 586 (1906); and Woodward's Appeal, 81 Conn. 152, 162 (1908).

[18] Huard, op. cit., p. 748.

[19] McFarlane, "The Mississippi Law on Adoptions," 10 Mississippi Law Journal (1938), p. 240; Woodward's Appeal, supra, note 17, at p. 162, where the statute is not specifically identified.

[20] Ross v. Ross, supra, note 17, at p. 262; Kuhlmann, "Intestate Succession By and From the Adopted Child," 28 Washington University Law Quarterly (1943), pp. 221-223.

[21] "An Act to Provide for the Adoption of Children," Acts and Resolves, January, 1850, to May, 1851, chap. 324; Acts and Resolves of 1923, chap. 432. Note that the law was significantly amended in 1931 (Acts and Resolves of 1931, chap. 342) when Massachusetts judges were required to refer all petitions for adoption of children under 14 to the State Department of Public Welfare for investigation, unless the petition was presented or recommended by a charitable corporation organized under state law for the purpose of caring for children.

[22] Understanding Adoption. Resources and Activities for Teaching Adults About Adoption (Boulder, Colorado: Adoption Builds Families, 1980), p. 10.

[23] Grace Abbott, The Child and the State (New York: Greenwood Press, 1963), vol. II, p. 165. Reprint of original edition (Chicago: University of Chicago Press, 1938).

[24] Benet, op. cit., p. 67.

[25] Ibid., p. 66.

[26] Arthur W. Calhoun, A Social History of the American Family (New York: Barnes & Noble, 1917), vol. I, p. 182.

[27] Benet, op. cit., pp. 59-60.

[28] Nigel Middleton, When Family Failed (London: Victor Gollancz, 1971), p. 24.

[29] Ibid., p. 26.

[30] The Adoption of Children, Consolidated Statutes of New

Brunswick 1877, c. 49.

[31] John A. MacDonald, "Canadian Adoption Legislation: An Overview," in Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984), p. 45.

[32] Newfoundland (which did not become a province until 1949) passed its first adoption legislation in 1940.

[33] B.C. Adoption Act, Statutes of British Columbia 1920, c. 2 (s. 12).

[34] Manitoba Child Welfare Act, 1922, Statutes of Manitoba 1922, c. 2.

[35] Ibid., s. 20.

[36] Ontario Adoption Act, 1921, Statutes of Ontario 1921, c. 55. (ss. 10-11).

[37] Ontario Adoption Act, 1927, Statutes of Ontario 1927.

[38] Margaret Kornitzer, Child Adoption in the Modern World (New York: Philosophical Library, 1952), p. 348.

[39] [1901] 2 K.B. 385, at p. 390.

[40] H. Philip Hepworth, Foster Care and Adoption in Canada (Ottawa: The Canadian Council on Social Development, 1980), p. 131.

[41] Margaret Lipman, "Adoption in Canada: Two Decades in Review," in Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984), p. 31.

[42] Hepworth, op. cit.

[43] Ibid.

[44] Lipman, op. cit., p. 32.

[45] Ibid.

[46] Hepworth, op. cit.

[47] Ibid.

[48] Lipman, op. cit., pp. 33-34.

49 Ibid., p. 35.

50 Margaret Ward, The Adoption of Native Canadian Children (forthcoming), quoted in Lipman, op. cit., p. 35.

51 National Association of Friendship Centre, "Recommendations Urge Native Involvement in Mental Health Imperative" 2(8) Native Perspective (1978), p. 82.

52 British Columbia Royal Commission on Family and Children's Law, Report (Part VIII: "Adoption") 1975.

53 Elizabeth S. Cole, "Adoption Services Today and Tomorrow," (North American Centre in Adoption, Child Welfare League of America, 1977), p. 182.

54 Alfred Kadushin, "Principles, Values, and Assumptions Underlying Adoption Practice," in Sachdev, op. cit., p. 3.

55 Child Welfare League of America, Standards for Adoption Services (New York: Child Welfare League of America, 1973--revised, 1978).

56 United Nations, European Seminar on Inter-Country Adoptions, Leysin, Switzerland, May 22-23, 1960 (Geneva: U.N. Technical Assistance Office, 1960).

57 Kadushin, op. cit., pp. 3-6.

58 Ibid., p. 6.

59 Margaret E. Hughes, "Adoption in Canada," in Derek Mendes Da Costa, ed., Studies in Canadian Family Law (Toronto: Butterworths, 1972), vol. I, p. 110.

60 Ibid., pp. 106-107.

61 Re LeSieur, [1951] 2 D.L.R. 775, at p. 785 per Ferguson J. (Ont. H.C.); Re A. and A. and G., [1948] 2 W.W.R. 751 (Sask. D.C.); Re Paul's Adoption (1959), 29 W.W.R. 252 (Sask. D.C.). But see also Re Beaulieu's Adoption Petition (1969), 3 D.L.R. (3d) 479 (N.W.T. Terr. Ct.); Re Adoption of Katie E7-1807 (1961), 32 D.L.R. (2d) 686, at p. 687 per Sissons J. (N.W.T. Terr. Ct.), where the adoption of children by Eskimo custom was upheld despite non-compliance with the statutory provisions because it was felt that "The adoption provisions contained in Part IV of the Child Welfare Ordinance are unrealistic having regard to conditions in the Northwest Territories."

62 Walters v. Phillips, [1955] 3 D.L.R. 840, at p. 846 per Adamson C.J.M. (Man. C.A.).

63 Hughes, op. cit., p. 107.

64 S. Katz, When Parents Fail: The Law's Response to Family Breakdown (Boston: Beacon Press, 1971), p. 132.

65 Ibid., pp. 95, 100.

66 Note: "Natural vs. Adoptive Parents: Divided Children and the Wisdom of Solomon," 57 Iowa Law Review (1971), p. 171.

67 See in this regard the leading American case of Stanley v. Illinois, 405 U.S. 645 (1972), which, although a neglect and dependency case rather than an adoption case, has nonetheless influenced the Supreme Court of the United States to remand several later adoption cases, eg., Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). The unmarried (putative) father in the U.S. obviously does have some rights when the mother gives up the nonmarital child for adoption (extrapolating from the decision in Stanley v. Illinois). The problems of defining the scope of such rights still remain.

68 Watson, "The Children of Armageddon: Problems of Custody Following Divorce," 21 Syracuse Law Review (1969), pp. 55, 64, 71. See also J. Goldstein, A. Freud, and A. Solnit, Beyond the Best Interests of the Child (New York: Free Press, 1979), pp. 31-34.

CHAPTER II

ADOPTION IN CANADA: PROCESS AND PROCEDURE

> Compared with childbirth, adoption is a civilized business. The preliminaries involve more red tape than passion.
>
> -----David C. Anderson
>
> Children of Special Value

Within the Canadian division of legislative competencies between federal and provincial governments, adoption belongs, as a matter affecting "property and civil rights," to the provinces. Thus each province, as well as each of the two territories, has its own adoption legislation, either in a separate adoption statute or, as is most often the case, as part of a more generalized child welfare or family services statute.[1] Notwithstanding various differences among provinces concerning traditional conceptions of child welfare which may be present in different regions of the country, there are a surprising number of similarities regarding the legal steps required prior to the obtaining of a final order for adoption.

In this study we shall thus not find it necessary to discuss and/or analyze every difference or nuance among the current statutes of Canada's twelve jurisdictions. We shall concentrate instead on the

major ways in which adoption policy has been reflected and continues to be reflected over the years in legislative change. Our main interest and focus will be on legislative developments and proposals from more recent years (when adoption policy has been more openly challenged perhaps than in the past); but we shall also, in the course of our discussions regarding specific problems in adoption law (as, for example, in the area of revocation of consent to adoption), refer to specific statutory changes in specific provincial laws and attempt to follow them through their various stages.

It is fair to say, however, that all Canadian adoption statutes have the following legal requirements in common: (1) the requirement for the adoptive parent or parents to come within one of the categories specified by statute of persons eligible to adopt (usually a married couple applying jointly to adopt a child unrelated to either of them, the spouse of a child's parent applying individually or jointly to adopt the child--i.e., a step-parent adoption, or a single person applying individually to adopt a child); (2) the requirement of a valid written consent to adoption given by the natural parents (if married), the mother of an illegitimate child, or by the Director/Superintendent of Child Welfare of the particular province (if the child is already a permanent ward of the Crown) and the consent of the child himself (if he is over a certain minimum age); (3) the requirement of a period of time (the adoption "probation period") that the prospective adoptee must spend in the adoptive home before

the final adoption order; (4) the requirement of a written report, usually prepared under the authority of the provincial Director/Superintendent of Child Welfare (the "home study"), which assesses the merits of the proposed adoption and which makes a recommendation to the court; (5) the procedural requirements relating to commencement of the action by the prospective adoptive parents within certain time limitations along with specific requirements as to jurisdiction, residence, the application's content, and the nature of the adoption hearing itself; and (6) the requirement that the judge, after considering the request for adoption and the recommendation of the report provided by the Director/Superintendent of Child Welfare, must be satisfied that the adoptive parents possess the ability and capacity to guide, maintain, and educate the child properly and that, consequently, the proposed adoption will be in the best interests of the child.[2] All Canadian adoption statutes also contain sections dealing with the legal effects of an adoption order, procedural requirements regarding revocation of an adoption order (setting aside), procedures for appealing an adoption order, and penalties for so-called "black market" activities in regard to the adoption process.

Yet adoption as a legal procedure whereby the legal relationship of parent and child is transferred <u>permanently</u> (emphasis mine) by judicial order from the natural parent(s) to the adoptive parent(s) actually begins outside many of the various adoption statutes with

the initial placement of a child in an adoptive home. Thus a very important preliminary matter in the study of Canadian adoption law is the authority to arrange adoptions currently in existence in Canada.

Most Canadian adoptions fall clearly into one of two categories: (1) agency adoptions (in which a non-profit authorized agency selects the adopters and arranges the placement in the adoptive home); or (2) private adoptions (in which no authorized agency is involved). In a "direct" or "open" private adoption, the natural parent or parents have selected the adoptive parents themselves (often friends or close family members). Step-parent adoptions also belong to this category. In another common form of private adoption (usually called "third party" adoption), the natural parents elect to place the child with adoptive parents via an intermediary (often a doctor or a lawyer).

These "third-party" private adoptions (often the source of much sensationalized publicity in the popular press) may be further subdivided into "grey market" and "black market" operations. The well-meaning doctor or lawyer who helps place a child without any view to profit, the relatives or friends of the natural parents who arrange the placement of a child in order to ease a family crisis situation are all within the "grey market" process; and such adoptions, with more or less regulation, depending upon the jurisdiction, are normally permitted by law - as are adoptions by step-parents. "Black market" private adoptions, on the contrary,

involve "the placement of a child by unscrupulous individuals strictly for profit and without regard to the suitability of the placement either from the standpoint of the child, the natural parent or the adopter."[3] "Black market" adoptions in Canada (as in most of the United States, England, and all other common law jurisdictions) are strictly prohibited.

At the present time, Canadian adoption legislation allows either agency or private adoption. Parents in Canada, provided they follow the rules laid down in the various adoption statutes, are basically free to place their children as they judge best: placing them directly, placing them through a private intermediary, or placing them with a private or government social agency. General statistics (the few we have available) seem to indicate that half of all adoptions involve permanent ward placements (thus necessarily an agency placement), one quarter are agency placements, and one quarter are private adoptions.[4]

Great controversy has always existed and continues to exist on the subject of the advisability of allowing third-party private adoptions at all (given the danger it presents to any kind of control over the matching of a child in need with a properly secure environment in the adoptive home). Yet the general Canadian trend has been to do nothing serious to regulate private adoption since its very existence remains an economic benefit to the province. For one must admit that

adoption, with its various statutory requirements regarding home studies, probationary periods, etc., is an expensive process for any government's child welfare department. Provinces lacking adequate adoption and child care agencies find their burden reduced by private adoption. If the province has adequate facilities, but not enough prospective adoptive homes, private adoption allows relatives to take on the care of a child without obliging them to go through the bureaucratic hassle of an agency.

Advantages of private adoption for members of the adoption triangle include, for the child, the possibility of a speedier placement. This advantage would seem to be the only benefit to the child; any other benefit he receives in private adoption is fortuitous. For the natural parent, too, an adoption done privately is usually faster (if time is a factor), and as its names implies it is a bit more private than an agency adoption. According to Goodacre and other writers who have considered the pros and cons of private adoption, an "open" private adoption further provides the possibility for the natural parent to choose adoptive parents and an adoptive home which seems most suited to the future welfare of the child.[5] The ability to maintain some degree of control over the adoption process seems important to many natural parents. As Hughes points out, too, in areas where there simply are no agencies in close proximity (such as the Northwest Territories and the Yukon) private adoption may be the only alternative to the parent keeping the child.[6] If the prospec-

tive adoptive parents fall outside agency guidelines of age, physical or mental health, private adoption may indeed be their only possible means of obtaining a child.

If one has worked at all as a practicing lawyer in the field of adoption, one quite often sees situations in which third-party private adoption (with certain controls) does seem to be the best solution all-round for the child and both sets of parents. Yet the potential risks inherent in private adoption are still there. For the natural parent, a private adoption--even one done through intermediaries--usually involves the examination of fewer prospective adoptive homes than would an agency adoption. Indeed the natural parent in a private placement situation usually has no benefit of counselling regarding all possible alternatives to adoption nor benefit of counselling to aid in adjustment after the adoption has taken place. One cannot even be sure of the positive value of knowing the child's new name and address and the identity of the new parents.

Obviously in such an "open" private adoption, there is also the ongoing risk to the adoptive parents that the child's natural parent(s) will somehow interfere with or intervene in the child's future life, or a less frequent but no less troubling possibility: that the adoptive parents might adopt a child who is physically or mentally handicapped without any counselling beforehand and with no

possibility for assistance to "undo" the adoption once the problem is discovered.

The greatest risk in private adoption situations still remains that of the child. For whereas in an agency placement, a pre-placement investigation considers the family background of the natural parents (including physical and mental health), the child (his physical health as well as his emotional well-being), and the prospective adopters (their physical and mental health, the stability of their marriage, the atmosphere of their home, their financial position, their reasons for wanting to adopt a child, their position in the community), none of this exists in private adoption.[7]

Hughes states that in third-party private adoption there is a tendency for the adults' needs to be placed in a superior position to those of the child.

> The child may be placed with individuals who are grossly unsuited to meet the demands of adoptive parenthood and whose motives in seeking a child may take little account of his welfare. Furthermore, the likelihood of an unsuitable placement is increased because, as a rule, neither the natural parent nor third parties have the skill, experience, or means that are

available to adoption agencies in selecting adopters.[8]

The only specific statutory safeguards currently in place regarding private adoptions include various requirements of notice to the provincial Director/Superintendent of Child Welfare either before the placement or after the placement of the child.

There are variations among jurisdictions as to the specific procedure to be followed once the original notification of a private adoption placement is received by the provincial Child Welfare department. In British Columbia, for example, within 14 days of placement the recipient is required to notify the Superintendent of Child Welfare in writing that the child has commenced to live with the applicant. At least six months prior to filing the application for adoption[9], the applicant must give notice to the Superintendent who must then request an assessment (investigation) of the applicants' circumstances and character, fitness to assume parentage by adoption, the child's fitness for adoption and then make a recommendation based on the investigation which will be placed before the court at the time of the hearing.[10] The report must be filed "before the date fixed for the hearing"[11], but in practice the assessment is not undertaken until very close to the hearing date. Thus the child has often already been in the prospective adopter's home for some five or five and one-half months. The alternative to allowing the adoption to

proceed (even if there are doubts about the suitability of the home or the prospective parents) is, of course, uprooting the child from an environment which is now familiar to him---something which in the end may cause more damage than leaving him where he is.

Thirteen years ago when third-party private adoption was much less strictly regulated than it is today, Hughes proposed that regulations be passed concerning these adoptions which would seek to maximize the advantages while minimizing the disadvantages to the procedure:

> Legislation should provide for official intervention in the adoption process before the child is placed in the care of the prospective adopters, even when the prospective adopters are relatives of the child. Where the natural parent or a third party proposes to place a child for adoption, he should be required to give the local authority 14 days' notice so that the local authority may investigate the suitability of the prospective home before the child is placed. Furthermore, since parents and third parties through ignorance or otherwise, may fail to notify the local authority, the statutes should also require that any person who is about to receive a child, except from a Children's Aid

> Society, with a view to legal or de facto adoption, should be required to give 14 days' notice to the Children's Aid Society of the area in which he is ordinarily resident. The Children's Aid Society receiving such notice should be required by law to investigate the proposed placement and have the power to apply for an immediate hearing to stop, temporarily at least, the proposed adoption if the Children's Aid Society is convinced that it is not in the child's best interests. Sanctions should be provided for non-compliance and if there is a failure to make the required notification, the individuals involved should be prosecuted, even if the fine is only nominal, to impress upon the natural and the adoptive parents the necessity of compliance with the notice requirements.[12] (emphasis mine)

It is submitted that the implementation of the above procedure in all Canadian jurisdictions would go far toward alleviating some of our worst fears about third-party private adoptions. One is still forced to worry about the potential for abuse in jurisdictions where private adoptions are allowed (as in Alberta, for example), but where there would appear to be virtually no statutory safeguards requiring notice

to the Director/Superintendent of Child Welfare (or, in Alberta, to the Children's Guardian) and where sometimes (as is the case in Alberta since the coming into force of the new Child Welfare Act on July 1, 1985) the investigative report submitted to the court (when not in respect of a permanent ward of the Crown) is now simply to be prepared by "a qualified person", ie., not necessarily the Director of Child Welfare.[13]

Thirteen years ago Hughes further reported that there had been little comparative research done on the success or failure of agency adoption placement versus private adoption placement. She suggested, however, that because of its numerous risks, private adoption might be less successful. In the intervening succeeding years, there has not been much more significant comparative research related to the mode of original placement in adoption. As was the case in 1972, the "success" or "failure" of adoptions (unfortunately seldom reported in quantifiable terms but rather in anecdotal or "case study" form) seems to depend on a variety of factors, none of which would lead to the decision that private placements ought to be prohibited. Indeed the opinion of several child welfare workers specializing in adoption matters surveyed informally was that if private adoptions were prohibited or severely restricted, the entire procedure would simply "go underground," and adoption orders would simply never be applied for for those children. De facto adoptions would increase--with the result that a child in need of the security of a family would in

actuality be deprived of it, having no legal status there at all. It would thus seem preferable then to provide clear legislative safeguards as suggested by Hughes rather than do away with private placement altogether. The preliminary issue of placement of the child for adoption leads us to yet another important prerequisite to the final adoption order per se and that is the question of "freeing" the child from the original parental tie (as in the breaking of the potestas of the paterfamilias in Roman law). There are obviously two ways in which this link may be broken: voluntarily (by the parent himself) or involuntarily (by the order of a court).

Although at common law it was impossible to voluntarily surrender one's rights as a parent, we have seen that statutory provisions today make such a "surrender" possible. Such a termination of parental rights is usually accomplished by means of some kind of surrender instrument (ie., the parent surrenders the child to the Director/Superintendent of Child Welfare--or the Children's Guardian--preliminary to the Director's placing the child for adoption) or, more simply, by the voluntary signing of a consent to adoption. No adoption order can ever be made until this first crucial "untying" has been accomplished. If somehow the adoption order is granted, it is null and void.

The second possibility mentioned above is the involuntary termination of parental rights by court order. Canadian legislative bodies and

Canadian courts have traditionally regarded the parent-child relationship as "grave and sacred" and have taken enormous care not to interfere in that relationship until the parent has fallen below a specific minimum standard of parenting (based on community standards and specifically defined in various child welfare statutes). Once the parents have demonstrated their inability to conform to the statutory requirements, they may find their parental rights terminated by proceedings which result in the child's being made a permanent ward of the Crown or, if adoption proceedings are already underway and the parents are now seeking to revoke their consents or refuse to give consent, they may have their consent to the adoption dispensed with by the court.

It is immediately apparent, then, that the question of consent (and the revocation thereof) is probably the most important element (as well as the most litigated) of the preliminary steps leading to an adoption order. Other essential preliminary steps--having the statutory capacity to adopt or be adopted, bringing oneself within the proper court's jurisdiction, fulfilling various requirements as to home studies and probationary periods, and respecting procedural practice requirements concerning notice of proceedings and contents of the adoption petition/application--all take second place to the issue of consent.

We shall consider each of these secondary matters before turning our

attention to the crucial issue of consent to adoption, keeping in mind, however, that the term "secondary" is used only as indicative of the number of legal tangles these areas actually cause in the adoption process. They are not in any way "secondary" in the ultimate granting of an adoption order by the judge, for since they form part of the statutory "red tape" of adoption, they must be understood and complied with--or no adoption order will go.

Adoption and Capacity: Who May Adopt? Who May Be Adopted?

Every provincial adoption statute begins with a section setting out those persons who are eligible to adopt and those persons capable of being adopted. In all Canadian jurisdictions prospective adoptive parents must be of the age of majority. Prospective adoptees are usually minor children (who have never been married), but adoption of adults is permitted in some jurisdictions (British Columbia, Prince Edward Island, Quebec, and the Yukon, for example). Statutory provision has been variously made for adoption by married couples applying jointly, by a step-parent (sometimes joined procedurally by the child's natural parent), or by single adults (with various stipulations as to required age or sex differentials between adopter and adoptee.)

The rationale behind these statutory rules governing capacity to adopt or to be adopted would appear to be the desire to establish and

maintain a reasonably stable and "mature" environment as the child's second family unit. Legislative change over the past thirty years has seen a gradual shift away from the traditional view that all prospective adoptive parents must be married couples and an increasing acceptance of single adults (whether never married, divorced, or widowed) as adoptive parents.

Jurisdiction in Canadian Adoption

Canadian adoption statutes also contain various requirements as to the residence or domicile of the adoptee and/or the adopter, which in turn determine the competency of the provincial court to make an order for adoption. Among the several provinces we can also note differences as to the particular level of courts where adoption hearings take place (said choice of forum is also significant in the eventuality of an appeal).

Probationary Periods and Home Studies

Every Canadian jurisdiction further provides for some form of probationary period between the placement of a child for the purposes of adoption and the issuance of a final order for adoption. The length of the probationary period depends sometimes on the nature of the adoption placement (private versus agency) or sometimes on the relationship between the child and the adopting parent(s) (relative

adoption versus non-relative adoption). All jurisdictions, too, require some kind of report (commonly and informally called the "home study") to be completed and presented to the judge at the time of the hearing. This report refers in general to the suitability of the adoptive parents to rear, educate, and otherwise provide for the child, their ability to be good parents, and whether or not the proposed adoption is seen to be in the best interests of the child in question. The British Columbia statute is typical, requiring an inquiry as to the circumstances and character of the applicant, the fitness of the applicant to assume parentage by adoption, the fitness of the child for adoption by the applicant, the circumstances leading to the placement of the child for adoption, the conduct of the applicant toward the child during the probationary period, and the conditions under which the child has been living during the probationary period.[14]

Under the new Alberta act, there is no specified probationary period, although the statute states specifically that a child is not eligible for adoption if he is under the age of ten days or, if he is subject to a permanent guardianship order whose appeal period has not yet expired.[15] All applications for adoption, however, must be accompanied by a report as to the suitability of the applicant as an adoptive parent, the capability of the applicant to assume parental responsibility toward the child, and a professional opinion as to whether or not the best interests of the child will be served by

granting the adoption order.[16] Yet only in the case of a child subject to a permanent guardianship order is the report required to be prepared by a director (designated by the Minister).[17] In any other situation (step-parent adoption, private third-party adoption) the required report may be prepared by "a qualified person"[18] and is simply served on the director along with the notice of the application. The director may then conduct a further investigation (emphasis mine), but this is obviously not mandatory.[19] It would appear that in this respect the Alberta legislation leans toward greater privatization of the adoption process. Psychologists, child psychiatrists, and social workers in private practice are all "qualified persons" who can report (for a fee) on the suitability of the prospective adoptive home in all adoptions which are classified as "non-ward." The cost of such service will thus be borne not by the government (as it formerly was when the Department of Social Services was charged with all home studies prior to adoption) but rather by the prospective adoptive parents. Whether or not this trend toward privatization is in the best interests of adopted children is currently the subject of much controversy in Alberta.

Most provinces normally have a six-month probationary period (British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island, Quebec, and the Yukon); the Northwest Territories has a one-year probationary period.

Traditionally, problems with the probationary periods have revolved around adoptive parents' apprehensions that the natural mother will revoke her consent during this time (after they have accepted the child as their own but before the final adoption order is made). The rationale underlying such a probationary period is, however, not actually based on the interests of the adults in the adoption triangle but on those of the child. Is this adoptive home a good one for this child?

It is clear from the literature that there are enormous bureaucratic delays and departmental backlogs when it comes to doing original home studies and then updating them prior to the actual adoption hearings; thus a six-month statutory probationary period can easily stretch on to a year or even eighteen months. This obviously increases the adoptive parents' fears that something could go wrong.

Yet it also seems imperative to maintain a probationary period in order to make absolutely sure that the child has been placed in a proper home.

Notice of Hearing

Since adoption involves the permanent severence of the original parental-child tie, the statutory requirements regarding notice of the hearing are quite precise and must be strictly complied with.

A further issue regarding notice of an adoption hearing involves the question of whether or not the putative father has any right to notice regarding the adoption of his child. We shall discuss the putative father and his rights *in re* adoption at greater length in Chapter IV; suffice it to say here that the current trend in many Canadian jurisdictions seems to be a movement toward giving notice to the putative father.

In summary, it can be seen that as a general rule notice must be given to all persons whose consent to adoption is deemed necessary if such persons have not previously given written consents. As previously mentioned, strict compliance with the technicalities of such requirements is essential. In *Re Winsor*[20], for example, the parents of two children had divorced and the decree nisi provided for custody to the mother and access to the father. The mother subsequently remarried and when she and her second husband made application to adopt the two children of the first marriage there was no consent to the adoption by the children's father nor did he receive notice of the hearing. At the hearing the judge dispensed with service of the adoption application, ordered the dispensing of the father's consent to the adoption, and granted the adoption orders to the mother and step-father. When the natural father eventually learned of the proceedings, he applied for writs of *certiorari* to quash the adoption orders. The Ontario High Court held that while the Child Welfare Act of Ontario allowed the court to dispense with a

parent's consent to adoption, there was no provision in the Act which would permit the dispensing of service of notice of the adoption application. In view of the serious nature of an adoption (the complete severence of the parent's tie to his child), any order made on application by one parent without service of notice on the other, was a denial of the latter's fundamental right to be heard, to cross-examine and to submit evidence and argument. The adoption orders were accordingly quashed.

The Adoption Hearing

Once the applicants have brought themselves under the court's jurisdiction, the probationary period has run, the written reports have been assembled along with the other necessary documentation, the required consents have been obtained, and notice of the hearing has been served on the proper parties, the preliminary steps to adoption are completed and what remains is the hearing itself.

All Canadian adoption legislation further specifies what materials need to be before the Judge at the time of the hearing. For example, Manitoba's Child Welfare Act provides that in an "agency placement" adoption, the following material must be filed with the court: required consents to adoption, copy of the original placement agreement between the agency and the prospective adoptive parents, child's birth certificate, order of permanent guardianship or

voluntary surrender of guardianship agreement where the guardianship is held by the Director of Child Welfare or a society, family, and developmental history of the child (identified by his adoptive name and birth registration number only), summary of the study of the adoptive parents, report and recommendation of the child care agency, marriage certificate of the adoptive parents (if joint application), any necessary authorizations extending or reducing the time for making the application, nisi and absolute decrees of divorce where an applicant is divorced, and death certificate where the application is brought by a surviving spouse or where a previous marriage of an applicant was terminated by the death of a spouse.[21] Other jurisdictions do not go into quite so much detail; but in practice it is found that all the above-mentioned documents are usually necessary for inclusion in the file and will need to be presented to the court before the final adoption order can issue.

As a general rule, the duty of the court at the adoption hearing is to be satisfied of two things: (a) that the requirements of the Act have been met and, in particular, that every person whose consent is necessary and whose consent has not been dispensed with, has indeed consented to the adoption and understands the nature and effect of the consent; and (b) that the order, if made, will be in the best interests of the child. It is to be noted that even when all the prerequisites for adoption have been complied with, the granting of an adoption order still rests with the judge's discretion. The

Alberta Child Welfare Act provides, for example: "If the Court is satisfied that (a) the applicant is capable of assuming and willing to assume the responsibility of a parent toward the child, and (b) it is in the best interests of the child that the child be adopted by the applicant, the Court may order the adoption of the child by the applicant."[22] (emphasis mine)

Thus can we sense that the intent of the legislation is to say that no one has an absolute right to adopt a child. As Hughes has pointed out, "The Court may grant an adoption order provided that all the requirements of the Act have been fulfilled and it thinks that the adoption is in the adoptee's best interests, but it has the right and duty of refusing the application if to do so seems fitting in the circumstances."[23]

In making its determination, the court considers all available information included in the court file. The adopters and the child usually must be present and the judge examines them as well as studies the report from social services. After reading many reported Canadian cases dealing with adoption criteria, one readily discerns the complex nature of the "best interests of the child" test. The multitude and inter-relatedness of the factors a court must consider here seem necessarily to make the test highly subjective. For example, the meaning of the words "and that the order will be in the best interests of the child" (from s.76 of the 1970 version of the

Ontario Child Welfare Act) was considered in Re Lamb.[24] This case arose during a time when the question of religion was a common source of conflict in adoption practice. In Re Lamb a Roman Catholic child had been placed with Protestant adoptive parents, and the final adoption order was opposed on the grounds that this religious "conflict" could not be in the child's "best interests." (The child had been with the adoptive family since the age of 23 days and indeed was not yet a year old at the time the application was heard). Little, D.C.J. held that there was nothing in the Act to bar the making of an adoption order on the basis of religion: "As there is no statutory bar to the making of an adoption order on the basis of religion, is there any logical reason why religion should be an obstacle? In my view there is not. This does not mean that the spiritual welfare of the child must not be considered. It should be weighed together with the physical, social, intellectual and emotional well being."[25] The judge emphasized that the presence or absence of a spiritual or religious influence might be a factor which would influence a court in deciding what is in the best interests of the child, but that it is not a condition precedent to adoption of children in Ontario that the applicant for adoption be of the same religious faith as the child.[26]

Interestingly enough, the Ontario legislation has since been amended (in order, presumably, to avoid the problems caused by a Lamb situation) so that on original placement of a child for adoption, the

religion of the child "follows" it to its prospective adoptive home (and the statute states quite precisely how the religion of the child is to be determined). Other Canadian jurisdictions have also amended their legislation to provide for specific "religious welfare" guidelines to help decide what is in the child's best interests. Yet the basic problem has certainly not been solved.

In the 1950's the problem was often centered around religion or race. In the 1980's we find ourselves (a full quarter century after Re Lamb) asking the same questions but this time about the sexual preference or orientation of the prospective adopters (Can having a gay or lesbian couple as parents be in the best interests of the child?) or their handicap (Are the child's best interests served by allowing his adoption by a deaf couple? A blind couple?) What about prospective adoptive parents who are members of cults or who have "different" views regarding blood transfusions or inoculations?

Before moving to a discussion of the effect of an adoption order once issued, we must first consider the major prerequisite to the granting of any such order: the question of consent. This issue is undoubtedly the central one among the various preliminaries to adoption.

Consent to Adoption

A corollary issue with notice is that of consent. Once again Canadian statutory provisions are quite detailed and must be strictly complied with. In general, the child's guardian or guardians must give written consent to the adoption. If parental rights are still in the child's natural parent, the parent must consent. If rights have already been taken away by court order or if they have been surrendered voluntarily to the Director of Child Welfare, then the Director's consent is sufficient. If the child himself has attained a specified age (usually 12), then he, too, must provide written consent to his adoption.

Each province deals with the possibility of dispensing with consent to the adoption (under various circumstances); but in all Canadian jurisdictions it is obligatory that a required consent to adoption be in existence at the time of the adoption hearing.

Obviously one of the most common problems is that given there is a probationary period between placement of the child in the adoptive home and the time of the final order for adoption, there are often attempts by persons who have originally consented to the adoption (usually the mother of the child) to revoke the consent and regain custody before the adoptive parents can obtain the final order. We shall deal in this chapter with the issue of revocation of consent

and attempted revocation of consent in all cases save step-parent adoptions which will be discussed in Chapter III.

Revocation of Consent to Adoption: Parental Rights v. Best Interests of the Child

Several Canadian jurisdictions have specific statutory provisions regarding the possibility of revoking a consent to adoption. British Columbia's Adoption Act, for example, provides that "no person who has given his consent to adoption, other than the child to be adopted, may revoke his consent unless it is shown to the Court's satisfaction that the revocation is in the best interests of the child."[27] New Brunswick's statute provides that a prospective adoptee, the Minister, or any other representative person or agency required to consent to the adoption pursuant to section 76(2) of the Family Services Act may revoke that consent at any time before an order for adoption is made.[28] A parent whose consent for adoption is required may revoke it by written notice at any time before an adoption order is made, except where the child has been placed for adoption by the Minister.[29] Newfoundland provides a period of 21 days following the giving of a consent to adoption during which the consent may be "cancelled" by the child's guardian or mother "by a document in writing to that effect."[30] But otherwise the consent "shall be irrevocable" unless a judge who is satisfied that it is in the best interests of the child to do so, orders its cancellation.[31]

Ontario, too, provides that any person who has given his consent to adoption, may cancel it in writing within 21 days after the consent is given. Where a required consent has been given, it may still be withdrawn after the 21-day period but only if "having regard to all the circumstances of the case, the court is satisfied that it is in the best interests of the child that the consent be withdrawn."[32] However, an application to the court for the withdrawal of a consent cannot be made after the child has been placed for adoption by an adoption agency or licensee (see sec. 60(5) of the Ontario Child Welfare Act) "so long as the child remains in the care of the person with whom the child was placed for adoption."[33] Prince Edward Island's legislation allows a mother who has given her consent to the adoption of her child or who has transferred the custody and guardianship of the child to the Director or to an agency with the authority to place the child for adoption, to revoke her consent (in writing) within one month "but not thereafter unless it is shown to the satisfaction of a judge that it is in the best interests of the child that the consent be withdrawn."[34] Other than the child to be adopted, no one else may revoke a consent to adoption without meeting the "best interests" test regarding the proposed revocation.[35] In Quebec a 30-day period for retraction is provided (and the custody of the child is immediately restored); after the 30-day period but before the adoption placement, the Court may be asked to allow a revocation of consent.[36] Saskatchewan has similar provisions allowing for the withdrawal of consent by written notice to the

Director at any time within 30 days of execution or at any time prior to placement in a home by the Director for the purpose of adoption (where the person with whom the child was placed has already supplied the Director with a petition "complete in all material respects" to adopt the child.)[37] The Yukon statute allows for revocation within 30 days (without giving reasons or showing cause) or after 30 days if the court is satisfied that it is in the best interests of the child that the consent be revoked. The person who has care and custody of the child at the time of a purported revocation may retain custody pending determination by the Court of whether the revocation of the consent is to be effective.[38]

The statutes of Alberta, Manitoba, Nova Scotia, and the Northwest Territories dealing strictly with adoption procedures remain silent as to the issue of revocation of consent; in those jurisdictions, thus, recourse must be had to other statutory provisions which regulate the issues of the guardianship and custody of children.

Obviously the problems involved in the revocation of a consent to adoption usually center on the conflict between the mother's "change of heart" after the surrender of her child and her concomitant desire to regain custody versus the equally strong desire of the child's adoptive family to retain custody of their newest family member.

If we look at the history of litigation regarding the right of a parent to revoke a consent to adoption, we note that when the question first arose the various adoption statutes then in place contained no provisions which specifically covered the situation. So since the court's ultimate decision as to whether or not the parent could revoke a consent to adoption effectively determined the issue of who had the right to the child's custody, guidelines for revocation were analogized to those traditionally used in custody disputes: the "parental rights" test and the "best interests of the child" test.

When a custody dispute was between a parent and some third party (as is usually the case in an adoption dispute), the "parental rights" doctrine was commonly invoked, with courts holding that the biological parent is entitled by right to the custody of the child unless he can be shown to be an unfit parent. To prove that a parent was unfit it was necessary to show that the parent was of such character, temper, and habits as would undoubtedly adversely affect the child; that the home environment offered by the parent was unsuitable; or that the parent had abandoned the child.[39]

When, however, a custody dispute was between parents, the "best interests of the child" test was usually invoked, which involved the court in an inquiry into a multitude of factors, eg., the age, sex, and health of the child, the emotional ties of the parents to the

child and the child to the parties, the desirability of maintaining continuity of the existing relationships between the child and a third party, the comparative "moral fitness" of the parties and the physical environments offered by them, and the articulated preference of the child.[40]

If a court attempts to apply the best interests test to a third party custody dispute (as in an attempted revocation of consent to adoption), it is interesting to note the procedural gymnastics often utilized which seem to increase the probability of the natural parent succeeding:

> The most common device has been the presumption that custody by the biological parent will be in the best interests of the child (...) A second procedural device used by some courts in conjunction with the presumption mentioned is to shift the persuasion burden to the third party on the issue of best interest (...) Finally, several courts have raised the level of proof on the issue of best interest, and thus further increased the burden of the third party (....)[41]

When these procedural devices are employed by the court, the total effect is to create "a continuum from a neutral determination of the

best interests of the child to a disguised application of the parental rights doctrine."[42]

In the Ontario case of Re Fex[43], McRuer, C.J.H.C., held that where a mother had signed a consent to adoption but had "neither abandoned her child nor defaulted in parental duties," and the prospective adoptive parents had taken the child and assumed parental duties towards it, the child could not be restored to the natural parent merely on her assertion of her parental "right" to custody. For McRuer, C.J.H.C., the parent had to go further and show that "having regard to the welfare of the child," the child should not be allowed to remain with the prospective adoptive parents. If the natural parents are permitted to withdraw their consent, then the whole scheme of the adoption statute is undermined since few people would care to adopt a child who could be taken from them without any fault on their part.[44] The Ontario Court of Appeal dismissed an appeal from McRuer's judgment.

The next important Canadian case concerning the possibilities of revoking a consent to adoption was Martin v. Duffell, the first of the cases which have come to be known as the "trilogy": Re Baby Duffell: Martin v. Duffell[45], Hepton v. Maat[46], and Re Agar: McNeilly v. Agar.[47]

Baby Duffell originated as an application by an unmarried mother (who

had revoked her previously given consent to adoption) to recover her child from the custody of the child's prospective adoptive parents. For the adoptive parents it was argued that once the consent had been voluntarily given by the mother, it was irrevocable or that at the least the revocation of consent "should be disregarded by the Court unless it appears to be in the best interests of the child that she [the mother] should be allowed to withdraw it."[48] The Court in Baby Duffell rejected McRuer's propositions from Re Fex, (the "best interests" test) and the notion of irrevocability of consent and followed instead an English Court of Appeal decision, Re Hollyman[49] and held that the mother was not bound by her initial consent to the adoption. Cartwright, J. based the majority decision on the principles that an adoption consent must be in existence at the time the final order is made and that a consent once given remains operable unless revoked, but that a parent may revoke her consent since

> It is (...) well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her (...)

> (...)[T]he mother of an illegitimate child cannot bind herself by an agreement to deliver up her child to a stranger, and (...) the Court will, on her application, compel the return of a child delivered pursuant to such an agreement (...)
> (...) In the present state of the law (...) giving full effect to the existing legislation, the mother of an illegitimate child, who has not abanadoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of [the] opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must (...) be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.[50]

Cartwright felt that any problem presented by consent revocation could be balanced by the power in the court to dispense with a parent's consent in a proper case; and although the welfare of the child is mentioned in passing, the concept is obviously linked with a citation from an earlier case, Re Agar-Ellis[51], where Browne, L.J. is

cited as follows: "It must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can."[52] Thus we see that thirty years ago, parental rights were foremost and the possibilities for revocation of consent very wide.[53]

Baby Duffell was followed not only by Ontario courts but by other jurisdictions as well.[54]

The second of the trilogy cases, Hepton v. Maat[55], was decided in 1957. There the married parents, Mr. and Mrs. Maat, decided to allow their new-born twin sons to be placed for adoption with the Heptons. They duly executed written consents to adoption; but when their economic fortunes had improved, they sought to revoke their consent and regain custody of the children. On appeal from the Ontario Court of Appeal, the Supreme Court of Canada held for the natural parents, once again ostensibly using the "best interests" test but stating at the same time that where competing claims exist between natural parents and strangers, the presumption is strong in favour of the parents; and their parental "right" to their children can only be lost through abandonment or serious misconduct. In the words of Rand, J.:

> [P]rima facie the natural parents are entitled to

custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As parens patriae the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility, as if, for example, he were a homeless orphan wandering at large.

The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to

> furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.[56]

Rand, J.'s approach was later put into point form, resulting in a five-step checklist of sorts to be utilized by the Court:[57]

> 1. The welfare of the infant is the paramount consideration.
>
> 2. The welfare of the child can never be determined as an isolated fact as if the child was free from natural parental bonds entailing moral responsibility, as if, for example, he were a homeless orphan wandering at large.
>
> 3. Prima facie, natural parents have a right to the custody of their child.
>
> 4. Apart from statute, parents can lose that right only by abandoning the child, or so misconducting themselves that in the opinion of the court it would be improper that the child should be allowed to remain with them.
>
> 5. Effect must be given to the parent's wishes unless "very serious and important reasons"

> require that, having regard to the child's welfare, they must be disregarded.[58]

Thus in Hepton v. Maat, as in Baby Duffell, the presumption that custody by the natural parent or parents will be in the best interests of the child is a disguised use of the parental rights doctrine. The conduct of the parent seems to be the most important factor, not a neutral determination of the child's welfare.

Finally, in the third case of the trilogy, Re Agar: McNeilly v. Agar[59], the Supreme Court of Canada once again allowed the mother of an illegitimate child to revoke her consent to adoption since there were "no serious or important reasons" for disregarding her wishes and since the Court apparently felt bound by the "rule" in Baby Duffell and Hepton v. Maat.

In the mid fifties, various legislatures began the process of acting on Cartwright's suggestion that adoption legislation be amended if the true intention of the Legislature was that the parent could not revoke a consent to adoption at will. British Columbia, Ontario, and Nova Scotia moved early to draft "revocation" sections, and other jurisdictions followed, with the result that all Canadian jurisdictions in 1985 provide for some possibility of revocation.

At first the new sections were seen by some judges as merely shifting

the onus of proof to the parent seeking to revoke his consent but with the primary considerations the same as in Baby Duffell.[60] However, the British Columbia case of Re Wells[61] marked a clear shift away from parental rights supremacy by holding that the newly-drafted revocation in the British Columbia Adoption Act ("No person who has given his consent to adoption, other than the child to be adopted, may revoke his consent unless it is shown to the Court's satisfaction that such revocation is in the best interests of the child"[62]) placed adoptive parents on a basis of equality with the natural parent (where the natural parent had consented to the adoption) and that the sole issue was the welfare of the child. In Re Wells the British Columbia Court of Appeal upheld the trial judge's refusal to allow the mother to revoke her consent, "having regard only to the welfare of the child and none to maternal rights."[63] The most recent solution to the revocation problem is illustrated by the 1985 Supreme Court of Canada decision, King v. Low.[64]

The facts of this case are typical of many adoption cases. Karen King had moved to the Northwest Territories at age 16 and had remained there even after her family returned to Ontario. She finished high school, trained as a heavy equipment operator, and worked steadily in that field in Inuvik. When she was 24 she became pregnant, but the father of the child, as soon as he learned of her pregnancy, quit his job and left the Northwest Territories, showing no interest in the child. For Karen King there was no possibility of

any further involvement with the natural father, and she decided to deal with the pregnancy on her own. Feeling sure that she would be ostracized by her own family if they were to learn of her predicament, she opted to have the child without informing her parents and place the baby for adoption when it was born. Since there is nothing in the Northwest Territories Child Welfare Ordinance prohibiting private adoptions, Ms. King chose this method of placement, for she wished the child to have a good home and at the same time she wanted to preserve perhaps the possibility of having some contact with the child as it grew up. George and Barbara Low were close friends, and since Ms. King knew that Mrs. Low wanted a child but had been advised that she would not be able to have one of her own, the decision was made that when Ms. King's baby was born, Mr. and Mrs. Low would be its adoptive parents.

John Michael was born in Yellowknife on April 4, 1982, and on April 9, 1982, the day Ms. King was discharged from hospital, Mr. and Mrs. Low took the baby home with them to Hay River. During her hospital stay, Ms. King was visited regularly by her friends, who wanted the baby but who also wanted to make sure that Ms. King still wished the adoption to proceed. Ms. King gave her consent freely and with full knowledge of what such a consent involved.

Yet the birth of the child "aroused in the mother a surge of maternal love and affection for the baby, far exceeding any expectation. [Ms.

King] changed her mind about the proposed adoption almost at once. She became reluctant to give up the child, but she had made arrangements with the respondents and she was advised by friends that in the long run adoption would be the best step for her to take."[65]

On April 19, 1982, (fifteen days after the birth as required by the Child Welfare Ordinance) she signed a consent to adoption. She then went to visit her family in Ontario (but still found it impossible to tell them about the birth of the child); she became quite depressed about the loss of her baby. On June 23, 1982, when she returned to the Northwest Territories, she informed Mr. and Mrs. Low that she wanted the child back. She also spoke to her own mother about the situation and found that her mother did support her. However, the Lows refused to return John Michael to Ms. King; she then "revoked" her consent to the adoption and commenced proceedings to regain custody of her child.

The trial judge considered the relevant statutory provisions, namely ss. 28(1), 35(2), and 37 of the Northwest Territories Domestic Relations Ordinance. Section 28(1) provides that the mother of an illegitimate child is its sole guardian. Section 35(2) and Section 37 deal with the duty of the court when a parent (or guardian) applies for the custody of his child:

35(2) If upon an application made by a parent or

other responsible person for an order for the production or custody of an infant the Court is of the opinion that the parent or other responsible person

(a) has abandoned or deserted the infant, or

(b) has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the infant,

the Court may, in its discretion, decline to make the order applied for.

37 Where a parent or other responsible person has

(a) abandoned or deserted his infant, or

(b) allowed his infant to be brought up by another person or by a school or institution at the expense of that other person or at the expense of the school or institution for such a length of time and under such circumstances

> that the parent or other responsible person was unmindful of his parental duties,
>
> the Court shall not make an order for the delivery of the infant to the parent or other responsible person unless the Court is satisfied that an order for the delivery of the infant would be for the welfare of the infant.[66]

The trial judge found that the mother had neither deserted nor abandoned her child nor had she conducted herself in such a way that the Court should refuse to enforce her parental rights pursuant to section 35(2). However, in the context of section 37(b), the trial judge found that Ms. King had been "unmindful of parental duties" in giving her child to the adoptive parents because of fear of problems with her own family. The decision to give the child to the Lows was motivated by a consideration of her own interests, according to de Weerdt, J.,[67] and this was sufficient to bring her within the ambit of the section. He then considered the question of the "welfare of the infant" and found in favor of the adoptive parents.

In a novel approach to the question of evaluating the suitability of the natural mother versus the adoptive parents to provide a sound and satisfactory upbringing for the child, de Weerdt, J. relied heavily

on the evidence of "bonding" between John Michael and the Lows: "(...) the process of bonding, that is, the formation of a relationship of love and obligation which is essential to the normal development of a child, had commenced and advanced to a point where removal of the child from its home would be a traumatic experience which could adversely affect his health and development."[68]

Ms. King appealed the trial judge's decision, but the Court of Appeal held that the trial judge had evidence before him to support his findings and that there was no error in his approach to the problem and accordingly dismissed the appeal. Prowse, J.A., in dissent, however, stated that the trial judge had unduly emphasized the question of bonding which, in Prowse's view, should not have had a decisive effect on the question of custody.[69]

Ms. King's subsequent appeal to the Supreme Court of Canada was also dismissed on the grounds that when the Court is exercising its parens patriae jurisdiction in questions of contested custody (including contests between natural and adoptive parents), it must consider the welfare of the child as the predominant factor and give it effect in reaching its determination. The welfare of the child includes all relevant factors - the psychological, spiritual and emotional; and the Court is obligated to choose the course which will best provide for the healthy growth, development, and education of the child so that he will be equipped to face the problems of life as a mature

adult. When the welfare of the child requires it, parental claims (even though they must be seriously considered) should be set aside.

The case of King v. Low, considered in conjunction with two other fairly recent Supreme Court of Canada decisions, namely, Beson v. Director of Child Welfare (Nfld.)[70] and Racine v. Woods[71], clearly shows the current emphasis on the "welfare of the child" as the paramount consideration when the court addresses the problem of contested custody as it relates to the process of adoption. As McIntyre, J. indicates in the King v. Low judgment, the law relating to the custody of children and the rights of parents where custody claims are involved has undergone progressive change since the early nineteenth century when the parent (usually the father) had an absolute right to the custody of his child unless he was disqualified by reason of some serious circumstance, having to do with the child's welfare, which made him unfit to have custody. But by legislative intervention and evolving case law, the situation has changed: "(...)the law has moved, first, toward an increase in maternal rights, a progressive diminution of parental rights; and then a corresponding increase in the consideration of the interest or welfare of the infant [has become] the significant factor in custody determination. This latter factor has become progressively more important until now it may be said that the welfare of the child is the paramount consideration when the courts address the problem."[72]

The "right" of a parent to withdraw or revoke his consent (the "parental rights" doctrine) prior to a final order of adoption is essentially a legal issue governed by statute law; but it has, as Hughes notes, far-reaching non-legal implications.[73] For agencies involved in adoption placement, the spector of revocation can mean the loss of countless hours of effort to find a good adoptive home for a child. For prospective adopters, the fear of revocation makes adoption perhaps too risky. For those prospective adoptive parents who already have a child in their home (as in King), the possible loss of that child can be heartbreaking. The child, too, may be seriously affected if there is an abrupt change in his environment. What then is the proper balance to be maintained between the right of a parent to the custody of her own child and the welfare of the child (as well as the interests of the adopters)?

If we consider the various possible statutory provisions in adoption law concerning revocation, we can distinguish three basic types: (a) consent is revocable absolutely until the final order issues; (b) consent is revocable at will for a specified period of time; (c) consent is revocable at the discretion of the court if the best interests of the child will be served by such revocation. The third type is indeed the one most commonly found in Canada and is the test recommended by the U.S. Children's Bureau for the following reasons: "[T]he court, assisted by its investigative and advisory personnel, is usually in the best position to decide what course of action is

best for the child and the parents in each case. The discretionary rule allows the court leeway to approve a revocation when the facts of the individual case warrant it."[74]

However, as Hughes and others have pointed out,[75] there are disadvantages to this test, the most significant being the total lack of specific criteria within the various statutes to be used by the court in determining the child's "best interests".[76] Since the test is so vague, the disguised parental rights test may still prove tempting. Another difficulty previously referred to is the reduced effectiveness of the probationary period if there is fear or worry in the adoptive family that the parent's consent may be revoked. In many jurisdictions, the procedure used where there is some fear of revocation is by way of a wardship application in order to transfer parental rights to the Director/Superintendent of Child Welfare so that he can give the required consent to adoption directly and avoid the uncertainty of the "best interests" test for revocation.[77]

Hughes suggests[78] that the Manitoba provisions allowing revocation at any time prior to the placement by the Director or an agency for the purpose of adoption may be a preferable procedure. The advantages include giving the natural parent a period of time in which she can change her mind as well as protecting the aims of adoption by providing some kind of security to the prospective adoptive parents.

In jurisdictions which still have no specific statutory provisions regarding revocation of consent, it is likely that courts will now follow the Supreme Court of Canada's decision in King v. Low. However, in the interests of both natural parents and adoptive parents, it is arguable that the statutory provisions dealing with consent to adoption should clearly set forth the legal effect of such a consent, including some limited right of revocation.

McIntyre, J. points out in King v. Low that judicial reaction to the trilogy had gradually become uneven by the 1970's when courts did begin to follow a more liberal application of their parens patriae jurisdiction[79] and lists other instances which mark departures from the strict application of the trilogy[80] on the basis that the law has evolved to accomodate changing social conditions and attitudes. Yet other cases referred to in the King v. Low judgment do not follow the trend away from Duffell, Hepton, and Agar. Some of them are distinguishable from the trilogy on the basis adopted by Dubin, J.A. in Re Moores and Feldstein, that is, that the welfare of the child in each case was consistent with the trilogy's parental preference[81]; but others simply apply the parental preference principle from the trilogy without further comment.[82]

This move away from reliance on parental rights or the parental preference of the common law is justified by reliance upon the court's equitable jurisdiction and is best illustrated perhaps by the

two Supreme Court of Canada cases on adoption decided just prior to King v. Low, namely Racine v. Woods[83] and Beson v. Director of Child Welfare (Nfld.).[84]

In Racine v. Woods the natural mother had simply left her child with the adoptive parents for some three years allegedly giving without her consent. The adoptive parents had applied for an order for adoption under the special de facto adoption provisions of the Manitoba Child Welfare Act (s. 103(2)) which allow an adoption to proceed without the parent's consent where the applicants have had de facto custody for a period of three years or more. The mother maintained that the adoptive parents were estopped from using the de facto section because they had failed to return the child to her when asked to do so. In answer to this submission, Wilson, J. said:

> I see nothing "improper" about the Racines proceeding by way of de facto adoption. The statute contemplates it. Moreover, in my view the crucial question is not what a court would have done with an adoption application made in 1978 but what it would have done with a habeas corpus application. Mrs. Woods might have succeeded on such an application in 1978 had she proceeded with it. Her failure to do so permitted her child to develop a dependency on

> the Racines as her psychological parents. It seems to me that Mrs. Woods had a responsibility when her rights were challenged to pursue them in the court if necessary and not to wait until her child was bonded to the Racines with all the problems for the child that the disruption of that bond was likely to create.[85]

If the natural mother had indeed "abandoned" the child, as the trial judge had found, the problem would have been easily solved. However, the Supreme Court of Canada rejected this finding of the trial judge but stated that even in the absence of a finding of abandonment, the welfare of the child was paramount enough to override the natural parent's wish to have the child restored to her. Much less weight was given to the consideration of biological ties than in the decisions of the 1950's. In Wilson, J.'s words:

> Be that as it may, I do not think a finding of abandonment was necessary to the trial judge's decision. I think the statute is clear and that s. 103(2) dispenses with parental consent in the case of a de facto adoption. This does not mean, of course, that the child's ties with its natural parent is irrelevant in the making of an order under the section. It is obviously very relevant

in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations. In giving the court power to dispense with the consent of the parent on a de facto adoption, the legislature has recognized an aspect of the human condition--that our own self interest sometimes clouds our perception of what is best for those for whom we are responsible. It takes a very high degree of selflessness and maturity--for most of us probably an unattainable degree--for a parent to acknowledge that it might be better for his or her child to be brought up by someone else. The legislature in its wisdom has protected the child against this human frailty in a case where others have stepped into the breach and provided a happy and secure home for the child for a minimum period of three consecutive years. In effect, these persons have assumed the obligations of the

> natural parents and taken their place. The natural parents' consent in these circumstances is no longer required.[86]

In Beson,--too, Wilson, J., writing for the majority, relied heavily on the Court's parens patriae jurisdiction to override all other considerations (going so far as to make the final adoption order at the Supreme Court level). Even though Racine was basically a case for dispensing with consent rather than strictly a question of revocation and Beson a case of a dispute between two sets of adoptive parents rather than a contest between a natural mother and adoptive parents, the new trend is now set.[87]

Dispensing with Consent to Adoption

We have already discussed the problems inherent where a parent seeks to withdraw or revoke a consent to adoption; thus we may now move to another possible scenario--where, for example, a required consent to adoption is either withheld ab initio (as is often the case in step-parent adoptions) or where for some reason the person whose consent is required is simply unable to do so (because he cannot be found, for example). To this end, all Canadian jurisdictions provide specific statutory means for dispensing with a required consent to adoption.

Alberta, for example, allows the Court to dispense with the consent of the guardian of the child (other than the Children's Guardian) or the child "if the Court, for reasons that appear to it to be sufficient, considers it necessary or desirable to do so."[88] British Columbia's Adoption Act also provides for the possibility of dispensing with consent in the following circumstances: the person whose consent is required has abandoned or deserted the child; cannot be found or is incapable of giving consent; is liable to contribute to the support of the child and has either persistently refused or neglected to give such support; or, in a very general sense, "is a person whose consent ought, in the opinion of the court, and in all the circumstances of the case, to be dispensed with."[89] The Court in British Columbia is free to act on the Superintendent's written report without further evidence.

Manitoba's Child Welfare Act allows the county court judge to waive the required consent of any person if the person cannot be found and all reasonable attempts have been made to find him or if it is in the child's best interest to dispense with consent.[90]

New Brunswick's stipulations concerning the waiver of required consent are similar to those of British Columbia. The only way the consent of the child can be waived is if he is unable to understand or to give it.[91] Any other consent may be waived if there has been abandonment or desertion of the child, disappearance, incapability of

caring for the child for a period of time of sufficient duration to be detrimental to the child's best interests, neglect or refusal to maintain the child, lack of an ongoing parental relationship with the child (and a delay in securing a home for the child would be detrimental to the best interests of the child), or if it is simply in the child's best interests.[92]

Newfoundland's adoption legislation allows for dispensing with the child's consent ("for any reason appearing (...) to be sufficient") and the guardian's consent where he is found to be "insane, incompetent or unfit to give consent," has neglected to provide proper care and maintenance, or where the judge deems the waiver of consent "necessary or desirable."[93]

Consent is dispensed with in Nova Scotia where the guardian is dead, of unsound mind, missing or unlocatable, has deserted or neglected to provide for the child's proper care and maintenance, has left the child to be supported by a child placing agency continuously for more than two years, "is divorced and neither has custody nor is contributing to the support of the child" or is a person whose consent "ought to be dispensed with."[94]

Ontario's provision is quite general, much like Alberta's:

69(7) Where a consent required by this section

> has not been given, the court may dispense with the requirement if, having regard to all the circumstances of the case, the court is satisfied that it is in the best interests of the child that the requirement be dispensed with.[95]

Prince Edward Island allows the judge to dispense with consent in cases of abandonment or desertion, incapacity, nonsupport, where the person whose consent is required "is the husband of the mother of the child and the judge is satisfied that such person is not the father of the child," or at the court's discretion.[96]

In Quebec the judge may waive the consent of child (ages 10 to 14) if he is incapable of consenting or refuses to consent; however, the consent of a child over 14 cannot be dispensed with.[97]

Saskatchewan allows consent to be dispensed with "if the judge, having regard to all the circumstances of the case, is satisfied that it is in the best interests of the child."[98]

In the Northwest Territories if the guardian is mentally disordered, incompetent or unfit to give consent, if he has neglected to provide care and maintenance for the child, or if the court considers it necessary or desirable, the judge may dispense with his consent.[99] He may also dispense with the consent of the child.[100]

Finally, the Yukon Territory Children's Act provides that a required consent to adoption may be dispensed with, having regard to the following factors: (a) whether continuing to require the consent would prejudice the best interests of the child; (b) whether the person whose consent has not been given is a "concerned parent" (one with lawful care or lawful care and custody of the child, one exercising or attempting to exercise rights of custody or access in relation to the child, one providing regular financial support, or one whose application relating to the child's care, custody, or access is already before the Court and awaiting adjudication); (c) whether the person whose consent has not been given is probably dead, is of unsound mind, or has not been found despite reasonable efforts to locate him; (d) whether the person has deserted the child or neglected to provide adequate care and nurture or financial support for the child.[101]

It should also be remembered, pursuant to our previous discussion of various statutory notice provisions in adoption proceedings, that failure to appear upon notice or appearing and failing to "show cause" why the adoption order should not issue are also grounds for dispensing with consent.[102]

Despite the wide range of possible grounds for the dispensing with consent to adoption, Canadian courts during the fifties and sixties,

when presented with an application to dispense with consent, seemed to restrict themselves quite narrowly to the old principles of parental rights and parental conduct as laid down by Cartwright, J. in Baby Duffell. The court's power to look at the "welfare of the child" as an entity unto itself seemed to be beyond the court's collective imagination.

For example, Hughes traces the relevant Ontario statutory provisions relating to dispensing with consent through their various permutations (1937-49: abandonment, desertion, neglect, non-support, "in the opinion of the court and in all the circumstances" discretion; 1949-58: "if having regard to all the circumstances" discretion; 1958-1972: "best interests of the child/all circumstances" discretion) and concludes that no matter what legislative amendments were enacted in an effort to move toward a focus on the child rather than on the parent, the Ontario courts stubbornly held on to the notion of the paramountcy of parental rights as a determining factor when a consent to adoption was to be dispensed with. One can only surmise that as the dispensing with parental consent was tantamount to an involuntary termination of the parent's rights vis-à-vis the child, the courts remained reluctant to go against a parent's wishes.

A clear example of this kind of reasoning is provided by the 1951 Ontario case of Re LeSieur[103], where Ferguson, J. was considering the 1949 Ontario provision regarding dispensing with consent. In LeSieur

a Catholic unwed mother had consented (in March, 1947) to the placement of her child in a Protestant home. The mother married the father of the child in August of 1947, thus legitimating it. Yet the child stayed in his adoptive home for almost four years, and when the adoption order was finally applied for, it was opposed on the alternative grounds that (a) either the mother had revoked her consent (thus there was no consent in existence at the time of the hearing and the adoption could not be ordered); or (b) even if she could not revoke her consent, the problem still remained since at the time of the application the natural father of the now legitimate child had not consented. In his decision, Ferguson, J. comments on the principles that should guide the court in exercising its discretion to dispense with the consent of a parent to the adoption of his child:

> [T]here is (...) much more at stake in this application than the scheme of the Adoption Act or even the welfare of this particular child. The right of parents to their own children is involved. In custody matters it has been held that the welfare of the child is the paramount consideration (....) [B]ut the right of adoption, the right to change a child's status, the right to change its parentage, is not (...) a right which depends on the welfare of the child

> but depends on the strict wording of the statutes, because apart from any statutes no such right exists. It may be better for any child of poor parents that it be raised by parents in well-to-do circumstances. It may be well for all children that they be raised in pious homes (....) The welfare of the child may be the paramount consideration in considering whether a child should be in the custody of "A" or "B", but in adoption matters it seems to me that public policy, the public and private rights of parents and their obligations toward their children are considerations which outweigh all others, and as their rights and obligations are fundamental to the stability and strength of the society in which we live, they ought not to be interfered with without clear and unambiguous legislation authorizing such interference.[104]

The judge goes on to say that the statutory provisions must not be construed so as to take away any rights which existed before the statute unless there were plain words which indicated that such had been the intention of the legislature. Thus, "whatever authority [the section] may give the Court to dispense with the consent of parents who are not in a position to give the same, I do not think it

goes so far as to enable the Court to make an adoption order where the parents not only do not give their consent but actively oppose the making of the order."[105] This would appear to indicate that dispensing with consent is only possible when parents are not in a position to give it and certainly underlines the court's emphasis on the conduct of the parent rather than on the welfare of the child in determining whether or not consent will be dispensed with.[106]

When the Ontario section was amended in 1958 to provide specifically for a "best interests of the child" test, the courts still did not relinquish their hold on the parental rights doctrine. According to Hughes, "[a]lthough there is a dislike of the proprietary conception of a parent's rights, many courts (...) feel that a vast difference exists between a custody award and an adoption order and that the courts must protect a parent's fundamental right to raise her own child until she is shown to be unfit. Furthermore, a literal interpretation of the best interests test, it is felt, would result in a redistribution of the minor population among the more worthier (sic) members of society, a project the courts have declined to undertake.[107]

For example, in Re Desmarais[108], a 1969 decision of the Ontario Court of Appeal, the mother had placed her child with the adoptive parents and had agreed that she and her husband would never again interfere with the child's welfare. She later refused to consent to the

adoption and although the court had the power simply to dispense with her consent, "if, having regard to all the circumstances of the case, the Court is satisfied that it is in the best interests of the child that the requirement [of consent] be dispensed with,"[109] the court nevertheless accepted the Baby Duffell principles and implied that a neutral determination of the "best interests of the child" was not a suitable test for dispensing with parental consent to adoption although it might be useful in a custody situation. Thus Schroeder, J.A.:

> The granting of an adoption order without the natural parent's consent is a much more serious matter than the making of an order for custody whether as between two parents, or a parent or parents and strangers. It is inherent in an order for custody that the order may be reviewed and altered or modified if changed circumstances make it imperative in the interests of the child's welfare that the order should be altered or modified accordingly. Such an order has not the quality of finality which is characteristic of an adoption order, nor is it nearly so far-reaching in its consequences. The order once made has the effect of severing the natural blood ties between parent and child and the adoptive

> parents assume for all time and for all purposes the place of the natural parents towards the child. Its name is changed to that of the adopting parents and it becomes their heir, while losing the right to inherit from its natural parents. The order of adoption once made is final and not subject to review or alteration.[110]

The 1966 case of Re Roebuck Adoption[111] still stands as an example of just how far courts have been willing to go in order to give effect to parental rights in questions of consent to adoption. In Roebuck, the mother had given up her three children for adoption on the break-up of her marriage. Married still but separated from her husband, she began to lead a promiscuous life, one result of which was the child born in 1962 (subject of the litigation). When the baby was born, Mrs. Roebuck left it with Mrs. H. (with no money or instructions) and disappeared. In June of 1963 she reappeared and agreed in a letter to give custody to the children's aid society with the view to placing the child for adoption. But in February of 1965 (after the child had already spent over a year with the prospective adoptive parents), Mrs. Roebuck refused to sign the adoption consent and disappeared once again. In 1966 the adoptive parents applied for a final order of adoption and asked that Mrs. Roebuck's consent be dispensed with. At trial, however, there was some evidence that Mrs. Roebuck had adopted a more settled lifestyle and was living with one

particular man. Ruttan, J. was well aware that the mother was unable to obtain custody of the child at the time of the hearing, that she might easily "revert to her previous irresponsible pattern of life," and that there might "well be no second chance for adoption and the child will lose the happy life it will obviously enjoy with the present applicants"; however, "none the less, I must find that it has not been shown the mother's consent should be dispensed with at this time."[112]

As Hughes remarks:

> The reluctance of the judiciary to exercise the discretion to dispense with parental consent and so abolish the substantive rights of the natural parent is understandable but often it has serious consequences for the child involved. Consideration for the welfare of the child may prompt a decision to remove it from the custody of the parent without further concluding whether it is unreasonable for the parent to resist the grave step of adoption. The emphasis on parental rights rather than on the welfare of the child means that many infants remain in foster care for years because "many parents of unwanted children find it hard to come to grips with the realities

> of the babies [sic] situation. They sustain a hope that 'some day' they will be in a position to 'take back their child', while remaining unable to mobilize themselves to act on any plan toward this end."[113] Such parents, although they may never regain custody of their children, are often not guilty of abandonment or misconduct sufficient to justify the court dispensing with their consent to adoption.[114]

Our final area of concern within the realm of dispensing with parental consent to adoption is the frequently litigated issue relating to the power of the court to dispense with parental consent when the adoption application is presented by one of the natural parents (who has normally been awarded custody of the child or children in a divorce decree) and that parent's new spouse. Often the non-custodial parent will refuse to consent and the question then becomes on what grounds will the consent be dispensed with?

A preliminary question and one which has been discussed at length by Bissett-Johnson and others is perhaps to ask why such adoptions are desired in the first place. It is clear that simply by marrying a child's parent the new spouse (or step-parent) acquires no parental rights at all. In law there is no connection between them.[115] Thus, in the words of Ormond, J.: "...it seems clear that the only way an

individual who is not one of the natural parents can acquire parental rights is by some legal process vesting in that person the so called parental rights in respect of the given child."[116] The ostensible aim of step-parent adoptions is thus to regularize the child's position in the new family so that as far as possible his status and rights shall be the same as those of the children born of his natural parent's second (or even third) marriage.

It is evident that divorce does not terminate parental rights in children and even if the grounds are adultery or cruelty, these have no bearing on parental "unfitness" which might be a ground for dispensing with consent to adoption. A custody award does not impute unfitness on the part of the "other" parent, and as noted by many judges, custody orders may always be varied on application if the circumstances surrounding parent and child change. Unless there is a statutory provision giving the parent with custody the sole right to consent to adoption[117], then the other parent will of course be obliged to consent or may have his consent waived.

Two very clear schools of judicial thought seem to exist in this area: either the courts tend to be past-oriented and attempt to avoid dispensing with the consent of a natural parent (thus leaving the child with his full complement of family members and not running the risk of allowing a custodial parent to effectively sever the child's ties to a parent he may still want to see) or they can be

said to be future-oriented and dispense with the natural parent's consent almost as a matter of course in order to "normalize" the child's new family unit.

Most earlier cases involving step-parent adoption applications applied Cartwright, J.'s Baby Duffell principles and required "serious reasons" to exist before the consent would be dispensed with.[118] Yet gradually step-parent adoptions became much easier to obtain as judges seemed to lean toward "tying up the loose ends" after a divorce and only recently have we seen a shift back toward the denial of such requests.[119]

The British Columbia Court of Appeal case of Sharp v. Sharp[120] provides an example of one approach to dispensing with consent in a step-parent adoption application. In this case the father had been granted custody in the divorce and he and his second wife applied to adopt the children and have the mother's consent dispensed with. The Court of Appeal emphasized the difference between custody and adoption applications, stating that although the "best interests of the child" test is the judicial test in custody proceedings, the fitness of the parent (whose consent is sought to be dispensed with) is also relevant when the application is for adoption. In the words of Davey, J.A.:

> In our province attention must be focused in the

> light of the attendance circumstances, on the person whose consent is to be dispensed with. The welfare of the child is no doubt one of the principal circumstances, but it must be related to the qualities, character, personality, or conduct of the parent whose consent is to be dispensed with, or matters pertaining to him. The welfare of the child cannot be considered at large or be treated as a governing circumstance if it is unrelated to such parent.[121]

In Sharp v. Sharp the consent of the mother was dispensed with.[122]

In Ontario the case of Ex parte Lawson[123] illustrates another typical scenario in step-parent adoption. The mother and her second husband applied to adopt her three children by her first marriage--whose natural father had had no contact with them for the last twelve years. Here the consent was dispensed with since it was in the interests of the children's welfare that the stepfather be made the legal as well as the de facto parent. A similar scenario is found in Re Application for Adoption[124] where the father's consent was dispensed with since although he was not guilty of abandonment or misconduct, he had not visited the child in over a year, was in arrears in maintenance payments, and the judge concluded that the "stable and loving" home his stepfather could provide would be better

for the child.

Oppel cites the case of Smallenberg v. Smallenberg[125] as representing an ideal approach to the question of dispensing with consent in a step-parent adoption. In Smallenberg the mother (custodial parent) and her second husband applied for the adoption of the daughter of the mother's first marriage. MacDonald, J., in considering whether or not he should dispense with the consent of the child's natural father (who opposed the adoption), pointed out that although the natural father had not often visited the child, this was partly attributable to the fact that the mother and stepfather had often refused access to him. The judge noted that although the child did seem to show some slight signs of emotional disturbance when she visited with her father, this too was perhaps explainable by the mother's animosity toward her ex-husband. In the words of MacDonald, J.: "It would be ironic if the party seeking adoption could improve his chances of success in litigation by conducting himself in such a way as to increase the disturbance of the child."[126] The decision in Smallenberg focuses on the fact that the proposed adoption will not confer any benefits on the child which she was not already receiving (ie., she would live in the same house, receive the same social and economic benefits, etc.), the dubious motivation of the mother and stepfather (malice toward the ex-husband and a desire to terminate his right of access), and the serious consequences to a child of the exclusionary effect of losing the benefit of a loving parent.

Dispensing with the father's consent was thus refused since "the natural father has something to offer his daughter for the years to come....The father (...) has (...) family who welcome the child as one of themselves. The natural father is there to assume responsibility and help his daughter should misfortune strike. He could, and likely would, be helpful to her in material and non-material ways in connection with her growing up and the furtherance of her life plans."[127]

Nova Scotia, the other jurisdiction studied by Oppel, has a slightly different test regarding the dispensing with a natural parent's consent in a step-parent adoption situation. This test, interpreted in Block v. Benight[128] and Wolfe v. Cherrett[129], is stated as that of determining whether on balance there will be a positive contribution to the welfare of the child if the adoption proceeds (Block v. Benight). In Block v. Benight (similar to Smallenberg) the child ~~wold have~~ had the same family home and environment if adopted but would also have lost a parent; thus the consent ~~of~~ the parent was not dispensed with. In Wolfe v. Cherrett the reasoning in Block was expanded so that the rights of natural parents were taken into account in considering whether to dispense with consent if the child would benefit now or in the future, from their exercise in the particular case. The "net gain" factors include considerations of whether the child needs protection from a "bad" parent, whether the child would benefit from the cessation of upsetting visits from the

natural parent, or whether the child's life would be more stable and happy if the adopting parents felt more secure by the granting of the adoption. The "loss" factors include the loss of love and company and other benefits from the natural parent if the adoption proceeds. In Wolfe v. Cherrett the objecting natural father was actually opposing the stepfather since the child's mother had died shortly following her remarriage (but after the filing of the application to adopt). In refusing to dispense with the consent of the natural father, the Nova Scotia Court of Appeal held that the child had nothing to gain by losing his father and everything to gain by having a parent in reserve.

Thus we see that circumstances vary from province to province when it comes to dispensing with the natural parent's consent to a step-parent adoption. Depending upon the wording of the particular statute, the courts can in the proper case dispense with consent and reconstitute a "new" family wherein the child will "benefit." Yet many writers (Bissett-Johnson, Oppel, Hughes, Hoggett) question whether this situation (the granting of an adoption order to a step-parent) is ever appropriate. Since the main effects of a step-parent adoption are always exclusionary (depriving the child of a parent while usually not changing his actual familial environment in any appreciable way), there is a growing tendency on the part of the courts to scrutinize such applications with even greater care than those where the contest is between a parent and strangers. Whether

parental rights/parental fault, best interests of the child, or "net gain/net loss" is the test applied, it is arguable that the ostensible desired result (giving some kind of parental authority to the step-parent) could be achieved by some other, less drastic, measure than adoption. We shall address the possibilities of alternatives to step-parent adoption in Chapter IV when we discuss current issues in Canadian adoption law.

We have now followed the adoption process through its red tape preliminaries and have discussed the various statutory requirements of capacity to adopt and be adopted, jurisdiction, placement, probationary periods and investigative reports, filing and notice, the critical issue of consent, and the hearing of the adoption application. If the applicants have successfully completed the preliminary steps, the judge will most likely order the adoption of the child; thus statutory death and rebirth are accomplished with the stroke of a pen. The legal effects of the adoption order once granted will be discussed in Chapter III.

NOTES

[1] As of July 1, 1985, Canadian adoption legislation may be found in the following statutes and ordinances:
(a) Alberta Child Welfare Act, Statutes of Alberta 1984, c. C-8.1.
(b) British Columbia Adoption Act, Revised Statutes of British Columbia 1979, c. 4, as amended.
(c) Manitoba Child Welfare Act, Statutes of Manitoba 1974, c. 30, as amended.
(d) New Brunswick Adoption Act, Revised Acts of New Brunswick 1980, c. C-2.1 as amended.
(e) Newfoundland Adoption of Children Act, Statutes of Newfoundland 1972, No. 36, as amended.
(f) Nova Scotia Children's Services Act; Statutes of Nova Scotia 1976, c. 8, as amended.
(g) Ontario Child Welfare Act, 1978, Revised Statutes of Ontario 1980, c. 66 as amended. NB: Ontario has new legislation regarding adoption declared in force on October 1, 1985.
(h) Prince Edward Island Adoption Act, Revised Statutes of Prince Edward Island 1974, c. A-2.
(i) In Quebec adoption legislation is contained in the Code Civil du Québec 1980, c. 39, Part III, c. 2: "On Adoption", ss. 595-632. (translation mine)
(j) Saskatchewan Family Services Act, Revised Statutes of Saskatchewan 1978, c. F-7.
(k) Northwest Territories Child Welfare Ordinance, Revised Ordinances of the Northwest Territories 1974, c. C-3, as amended.
(l) Yukon Territory Children's Act, Statutes of Yukon Territory 1984, c. 2.

[2] John A. MacDonald, "Canadian Adoption Legislation: An Overview," in Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984), pp. 43-44.

[3] Margaret E. Hughes, "Adoption in Canada," in Derek Mendes Da Costa, ed., Studies in Canadian Family Law (Toronto: Butterworths, 1972), vol. I, p. 108. See, for example, a series of articles which appeared in the Edmonton Journal in April of 1985 detailing alleged "black market" baby selling activities in several large Edmonton hospitals.

[4] Hughes, op. cit., p. 116.

[5] Iris Goodacre, Adoption Policy and Practice (London: George Allan & Unwin Ltd., 1966), p. 129.

[6] Hughes, op. cit., p. 109.

[7] Ibid.

[8] Ibid., pp. 110-111.

[9] Application for adoption rather than petition is the term used in British Columbia and seems to be the more "modern" choice of legislative drafters.

[10] British Columbia Adoption Act, R.S.B.C. 1979, c. 4, s. 6 (a)-(e).

[11] Ibid., s. 6(5).

[12] Hughes, op. cit., pp. 112-113.

[13] Alberta Child Welfare Act, S.A. 1984, c. C-8.1.

[14] British Columbia Adoption Act, R.S.B.C., ss. 6(3) (a)-(e), 7, 8.

[15] Alberta Child Welfare Act, S.A. 1984, c. C-8.1, ss. 63(2), 56(3).

[16] Ibid., s. 59(1) (a)-(c).

[17] Ibid., s. 59(2).

[18] Ibid., s. 59(1).

[19] Ibid., s. 59(3) (4).

[20] Re Winsor (1966), 59 D.L.R. (2d) 42 (Ont. H.C.). See also Re Gorenstein, [1951] 1 D.L.R. 455 (Man. C.A.) and Walters v. Phillips, [1955] 3 D.L.R. 840 (Man. C.A.)

[21] Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 99(8).

[22] Alberta Child Welfare Act, S.A. 1984, c. C-8.1, s. 63(1).

[23] Hughes, op. cit., pp. 158-159.

[24] Re Lamb [1961] O.W.N. 356 (D.C.).

[25] Ibid., p. 359.

[26] Ibid.

[27] British Columbia Adoption Act, R.S.B.C. 1979, c. 4, s. 8(7).

[28] New Brunswick Family Services Act, Acts of N.B. 1980, c. C-2.1, s. 77(1).

[29] Ibid., s. 77(2).

[30] Newfoundland Adoption of Children Act, S. Nfld. 1972, No. 36, s. 9(8).

[31] Ibid., s. 9(9).

[32] Ontario Child Welfare Act, R.S.O. 1980, c. 66, ss. 69(2) (9).

[33] Ibid., s. 69(10).

[34] Prince Edward Island Adoption Act, R.S.P.E.I. 1974, c. A-2, s. 9(1).

[35] Ibid., s. 9(2).

[36] Code Civil du Québec 1980, Arts. 609-610.

[37] Saskatchewan Family Services Act, R.S.S. 1978, c. F-7, s. 52(4).

[38] Yukon Territory Children's Act, S. Yukon 1984, c. 2, s. 86(1)(2).

[39] Hughes, op. cit., p. 124.

[40] Note, "Alternatives to Parental Right in Child Custody Disputes Involving Third Parties," 73 Yale Law Journal (1973) 151, p. 153.

[41] Ibid., pp. 154-155.

[42] Ibid., p. 154.

[43] Re Fex, [1948] 3 D.L.R. 754 (Ont. C.A.).

[44] Ibid., p. 758.

[45] Re Baby Duffell: Martin v. Duffell, [1950] S.C.R. 737.

[46] Nepton v. Maat, [1957] S.C.R. 606.

47 Re Agar: McNeilly v. Agar, [1958] S.C.R. 52.

48 (Re Baby Duffell), [1950] 4 D.L.R. 1, p. 8.

49 Re Hollyman, [1945] 1 All E.R. 290 (Eng. C.A.).

50 (Baby Duffell), [1950] 4 D.L.R. 1, pp. 7-9. Anyone involved in researching the law of adoption in Canada soon discovers that these statements of Cartwright J. appear again and again--and again--in subsequent decisions.

51 Re Agar-Ellis.

52 Cited in Baby Duffell, [1950] 4 D.L.R. 1, p. 10.

53 At the same time, however, it is interesting to note the case of Re G., G. v. C., [1951] 3 D.L.R. 138, a British Columbia case which held that the British Columbia Adoption Act was different from the Ontario act and from the English act used by the Supreme Court of Canada in Baby Duffell. In British Columbia a consent once validly given could not be withdrawn since, according to Manson J. the statute made it "abundantly clear that the legislature is concerned primarily with the welfare of children and not primarily with the possessive right of parents to children." (at p. 148) It is in this British Columbia decision that we find the first direct judicial suggestion that it would be wise to fix a short statutory period within which a parent might withdraw consent (to operate as a safeguard against a consent given under the stress of temporary circumstances).

54 See Re LeSieur, [1951] 2 D.L.R. 775; Re Greenwood, Storvald and Storvald v. Black (1956), 4 D.L.R. (2d) 711 (Alta. D.C.); C. v. K. (1959), 22 D.L.R. (2d) 81 (Sask. C.A.).

55 Hepton and Hepton v. Maat and Maat, [1957] S.C.R. 606, 10 D.L.R. (2d) 1 (S.C.C.), affirming 7 D.L.R. (2d) 488 (Ont. C.A.).

56 Hepton v. Maat, 10 D.L.R. (2d) 1, pp. 1-2.

57 See Aylwin v. Good (1963), 42 W.W.R. 209, p. 211 per Bird, J.A. (Y.T.C.A.); Husband v. Husband (1966), 55 W.W.R. 213, p. 220 (B.C.S.C.).

58 Hughes, op. cit., pp. 130-131.

59 Re Agar: McNeilly v. Agar, [1958] S.C.R. 52; (1957), 11 D.L.R. (2d) 721 (S.C.C.), affirming (sub nom. Re Agar) (1957), 8 D.L.R. (2d) 353 (Ont. C.A.).

60 See the judgment of McInnes J., in Re B.J.E. (1961), 27 D.L.R. (2d) 723 (B.C.S.C.).

61 Re Wells (1962), 33 D.L.R. (2d) 243 (B.C.C.A.).

62 Adoption Act, Statutes of British Columbia 1957, c. 1, s. 8(5).

63 Re Wells, supra, p. 249.

64 King v. Low [1985] 1 S.C.R. 87.

65 Ibid., per McIntyre J. at p. 90.

66 Domestic Relations Ordinance, R.O.N.W.T. 1974, c. D-9.

67 (King v. Low), [1983] N.W.T.R. 97.

68 King v. Low [1985] 1 S.C.R., pp. 92-93.

69 (King v. Low), [1983] N.W.T.R. 1, 148 D.L.R. (3d) 247, 45 A.R. 88.

70 Beson v. Director of Child Welfare (Nfld.), [1982] 2 S.C.R. 716.

71 Racine v. Woods, [1983] 2 S.C.R. 173.

72 King v. Low, supra, S.C.C., p. 93.

73 Hughes, op. cit., p. 123.

74 Children's Bureau Publication No. 394, U.S. Dept. of Health, Education, and Welfare, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children (1961), p. 25.

75 Hughes, op. cit., pp. 133-134.

76 s.1 of Ont. C.W.A. does provide definition, etc.

77 This was the procedure used in Mugford v. Children's Aid Society, [1969] 4 D.L.R. (3d) 274 (S.C.C.) but which was unsuccessful. The Ontario Child Welfare Act now provides for a 30-day appeal period from the order of Crown wardship and a Crown ward is not to be placed for adoption until the appeal period has run or while any appeal proceedings are in progress. Crown wardships, however, cannot

be terminated (whether in the best interests of the child or not) once the child has been placed in a home for adoption until an adoption order is made. (See Ontario Child Welfare Act, ss. 32(1) and 32(2)).

78 Hughes, op. cit. pp. 134-135.

79 King v. Low, supra, note 64, p. 96. See, for further examples of this shift toward the welfare of the child test, Re Wells, supra, note 61; Re Jenkins (1973), 5 Nfld. & P.E.I.R. 325 (Nfld. S.C.); C.A.C. v. F.D.R. and S.J.R. (1979), 21 N.S.R. (2d) 631 (C.A.).

80 Re Moores and Feldstein (1973), 12 R.F.L. 273 (Ont. C.A.); Elias v. Elias (1980), 14 R.F.L. (2d) 228 (Man. Q.B.); Nelson v. Findlay and Findlay (1974), 15 R.F.L. 181 (Alta. S.C.); Power v. Crowe (1982), 52 N.S.R. (2d) 165 (Co. Ct.).

81 See, for instance, Re Mugford, [1970] 1 O.R. 601 (C.A.), affirmed [1970] S.C.R. 261; Re Blenus (1979), 35 N.S.R. (2d) 396 (T.D.); C. v. K. (1959), 30 W.W.R. 310 (Sask. C.A.); Gerk v. Ventress (1964), 48 W.W.R. 245 (Alta. S.C.).

82 See, for example, Re Ezekiel (1980), 30 N.B.R. (2d) 343 (Q.B.); or Meikle v. Authenac (1970), 3 R.F.L. 84 (Alta. S.C.A.D.).

83 Supra, note 70.

84 Supra, note 71.

85 Racine v. Woods (S.C.C.), p. 184.

86 Ibid., p. 185.

87 For other cases concerning the withdrawal or revocation of parental consent to adoption, see Re Infant Registration No. 74-09-001156, [1975] W.W.D. 13 (B.C.); McKeever v. Metro. Toronto Children's Aid Society (1975), 22 R.F.L. 346 (Ont.); Re. J.B.G. (1978), 24 N.B.R. (2d) 214, 48 A.P.R. 214 (C.A.); Re J. (1979), 9 R.F.L. (2d) 281 (Ont. H.C.); Re D.I.C. (1971), 4 R.F.L. 35 (N.S.); Superintendent of Child Welfare v. Bennett, [1973] 1 W.W.R. 366, 10 R.F.L. 87, 33 D.L.R. (3d) 638 (sub nom. Re Bennett), reversing (sub nom. Bennett v. Supt. of Child Welfare) [1972] 5 W.W.R. 708, 8 R.F.L. 291, 296, 298, 29 D.L.R. (3d) 109 (B.C.C.A.); Re M.J.C. (1972), 5 N.B.R. (2d) 28, 30 D.L.R. (3d) 455 (C.A.); Re Infant, Birth Registration No. 71-09-013131, [1972] 6 W.W.R. 711, 9 R.F.L. 196 (sub nom. Re Adoption No. 71-09-013131) (B.C.); Re Kilmer and Resney, [1973] 2 O.R. 482, 11 R.F.L. 375, 34 D.L.R. (3d) 330; Re M.L.G., S. v. A.B.

(1956), 19 W.W.R. 226, 4 D.L.R. (2d) 711 (Alta.); Re E. (1961), 34 W.W.R. 433, 27 D.L.R. (2d) 723 (sub nom. Re B.J.E.) (B.C.); Re G.J.W. (1959), 18 D.L.R. (2d) 231 (B.C.); Gerk v. Ventress (1964), 48 W.W.R. 245 (Alta.); Re D. (1957), 10 D.L.R. (2d) 713 (B.C.); Re Blunderfield and Jamieson, Re Jamieson (1958), 27 W.W.R. 1, 17 D.L.R. (2d) 583 (Man.).

88 Alberta Child Welfare Act, S.A. 1984, c. C-8.1, s. 60(2).

89 British Columbia Adoption Act, R.S.B.C. 1979, c. 4, s. 8(8).

90 Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 84.

91 New Brunswick Family Relations Act, Acts of N.B. 1980, c. C-2.1, s. 78(2).

92 Ibid., s. 78(1)(a)(b).

93 Newfoundland Adoption of Children Act, S. Nfld. 1972, No. 36, s. 9(2) (3) (a)-(c).

94 Nova Scotia Children's Services Act, S.N.S. 1976, c. 8, s. 17.

95 Ontario Child Welfare Act, R.S.O. 1980, c. 66, s. 69(7).

96 Prince Edward Island Adoption Act, R.S.P.E.I. 1974, c. A-2, s. 10.

97 Code Civil du Québec 1980, Arts. 601 and 602.

98 Saskatchewan Family Services Act, R.S.S. 1978, c. F-7, s. 53.

99 Northwest Territories Child Welfare Ordinance, R.O.N.W.T. 1974, c. C-3, s. 85(4).

100 Ibid., s. 86(1) (2) (3).

101 Yukon Territory Children's Act, S. Yukon 1984, c. 2, s. 87(1) (2).

102 In the jurisdictions of Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan.

103 Re LeSieur, [1951] 2 D.L.R. 775 (Ont. H.C.); appeal quashed [1952] 1 D.L.R. 93 (C.A.).

104 Ibid., p. 781.

105 Ibid., p. 782.

106 See the comments of Wilson J.A. in Re Sharp, Sharp v. Sharp (1962), 36 D.L.R. (2d) 328, p. 345 (affirming 38 W.W.R. 257 (B.C.-S.C.).

107 Hughes, op. cit., p. 140. See also Helen Simpson, "The Unfit Parent: Conditions Under Which A Child May Be Adopted Without the Consent of His Parent," 39 University of Detroit Law Journal (February 1962), p. 355.

108 Re Desmarais (1969), 3 D.L.R. (3d) 617 (Ont. C.A.).

109 The Child Welfare Act, Revised Statutes of Ontario 1970, c. 64, s. 73(5).

110 Supra, note 108, p. 621.

111 Re Roebuck Adoption (1966), 58 D.L.R. (2d) 716 (B.C.S.C.).

112 Ibid., p. 725

113 Report of the Joint Legislative Committee on Child Care Needs (New York, March, 1967), p. 54.

114 Hughes, op. cit., pp. 146-147.

115 "The Step-Relationship and Its Legal Status," 5 Anglo-American Law Review (1976), p. 259.

116 Re N., [1974] 1 All E.R. 126 (Fam. Div.), p. 130.

117 See Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 86(1)(c).

118 See, for example, Hawkins and Hawkins v. Addison, [1955] 3 D.L.R. 435 (Alta. S.C.A.D.); Re Tonge and Cochrane (1958), 16 D.L.R. (2d) 276 (N.B.S.C.); Re Adoption Act, Re de Montigny's Petition (1962), 40 W.W.R. 160 (B.C.S.C.); Re Drummond Infants (1968), 1 D.L.R. (3d) 309 (B.C.).

119 An example of this rubber-stamping attitude toward step-parent adoption is discussed in Wilfred Oppel, "Step-Parent Adoptions in Nova Scotia and British Columbia," at pp. 643-645 where the author cites a series of Nova Scotia cases all decided by O'Hearn, Co. Ct. J. in which all step-parent applications were allowed as a matter of

course (including the dispensing with consent of the natural parent). The author quotes O'Hearn J. in Re Hill (1975), 20 N.S.R. (2d) 528 (N.S. Co. Ct.) at p. 534: "I have yet to see a case where the decision [to dispense with the natural parent's consent] did not prove the better solution." Oppel comments, quite correctly, that the psychological mindset of the individual judge is often the determining factor in such cases rather than the wording of the section.

120 Re Sharp, Sharp v. Sharp (1962), 40 W.W.R. 521 (B.C.C.A.).

121 Ibid., p. 530.

122 Sharp v. Sharp has been followed in British Columbia in Re Adoption Nos. 60-09-017014 and 62-09-027718, [1972] 2 R.F.L. (2d) 220 (B.C.C.A.); Smallenberg v. Smallenberg (1978) 5 R.F.L. (2d) 315 (B.C.S.C.). In Re Adoption Nos., for instance, the judge dispensed with the consent of a father described as a "painter, part-time actor, poor provider and habitual drinker" who was at least partly responsible for the emotional problems of his children.

123 Ex parte Lawson, [1960] O.W.N. 267 (Co. Ct.).

124 Re Application for Adoption (1967), 64 D.L.R. (2d) 538 (N.S. Co. Ct.).

125 Smallenberg v. Smallenberg, supra, note 122.

126 Ibid., p. 324.

127 Ibid., p. 323.

128 Block v. Benight (1974), 8 N.S.R. (2d) 210 (N.S.S.C.A.D.).

129 Wolfe v. Cherrett (1978), 28 N.S.R. (2d) 17 (N.S.S.C.A.D.).

CHAPTER III

THE LEGAL EFFECTS OF AN ADOPTION ORDER

Custody may be awarded for a temporary duration but a decree of adoption severs forever every part of the parent and child relationship; severs the child entirely from its own family tree and engrafts it upon that of another. For all legal and practical purposes a child is the same as dead to its parents.

-Re Adoption of Bryant v. Kurtz, 134 Ind. App. 480, 487, 189 N.E. 2nd 593, 597 (1963)

In general it is the policy of the law to make the veil between the past and present lives of adopted people as opaque and impenetrable as possible, like the veil which God has placed between the living and the dead. (...) The ancient and traditional concept of adoption is that as of the moment of the adoption, the child is literally born again. It has, by law, been given a second birth. Its past life is cancelled out. The child is a new person.

---C.L. Gaylord, "The Adoptive Child's Right to Know"

The two quotations given above sum up in aphoristic style the basic element of the aftermath of the adoption process, the element of "as if." Inherent in the process of adoption is the necessity of treating the child, once the adoption order is finalized, "as if" he were the "real child" of the adoptive parents. The biological parents, at the moment of the adoption order, "die" statutorily for the child. He is now part of a new family, a new social unit.

What then are the legal effects of an order for adoption on the child and on his parents (both natural and adoptive)? How does an order for adoption affect the child's property rights (his right to inherit, for example), his personal rights (his capacity to marry, for instance), the "access" rights of his natural parents to him (as per a previous decree nisi of divorce), or the possibilities of his acquiring information concerning his own origins? We shall address each of these questions in turn.

Legal Effects of the Adoption Order: Statutory Provisions

Hughes has noted that the general effect of an adoption order is to establish the legal relationship of parent to legitimate child between the adopter and the adoptee, which consists of the same rights and duties as exist between a natural parent and child. However, since in reality five sets of people are involved in any one

adoption (the child, the natural parents, the natural kindred, the adoptive parents, and the adoptive family kindred), the legislatures have tried to deal with adoption as it affects the entire family tree and not just the individual child and two sets of parents in isolation. The general trend has thus been to extend to the adoptive family all the legal incidents of a natural family and to divest the natural family of all legal connections with the child.[1]

Fifteen years ago in Canada two basic legislative approaches were taken: (a) legislation divesting certain persons of specified rights and obligations and imposing those rights and obligations on others; or (b) legislation simply making the adoptee for all intents and purposes (emphasis mine) a member of the adoptive family and no longer a member of the natural family.[2] Obviously in those jurisdictions using approach (a), "divesting and imposing", the specific rights and obligations involved must be carefully examined since with the five sets of people referred to above, there can always be an omission "to expressly refer to all the rights and obligations which presumably are intended to be removed from or imposed upon any particular set or sets of persons."[3] If this occurs, it is the common law (which did not, as we have seen, recognize adoption) which must be used to fill in the statutory gaps rather than any modern concepts regarding the adoptive relationship. In jurisdictions employing option (b), the adopted child is granted the legal status of a child born in lawful wedlock to the adopters and all the legal

rights and obligations which flow from that status. There are a few exceptions (relating to incest and the prohibited degrees of marriage), but otherwise the child is deemed to have been born to his adoptive parents just like any other of their "natural" children. In both (a) and (b) the legal effect of the adoption order has a dual aspect: the cessation of legal rights and duties flowing between the child and his natural parents and the revesting of those same rights and obligations in the adoptive parents.

What then is the legislative situation in Canada in 1985?

In Alberta the legal effect of an adoption order is as follows:

> 64(1) For all purposes when an adoption order is made the adopted child is the child of the adopting parent and the adopting parent is the parent and guardian of the adopted child as if the child had been born to that parent in lawful wedlock.
>
> (2) Subject to subsection (3), for all purposes when an adoption order is made the adopted child ceases to be the child of his existing parents, whether his biological mother and biological father or his adopting parents under a previous

adoption, and his existing parents cease to be his parents and guardians.

(3) If a person adopts the child of his spouse, the child does not cease to be the child of that spouse and that spouse does not cease to be the parent and guardian of the child.

(4) In any testamentary or other document, whether made before or after the coming into force of this section, unless the contrary is expressed, a reference to a person or class of persons described in terms of their relationship by blood or marriage to another person shall be deemed to refer to or to include, as the case may be, a person who comes within the description as a result of his own adoption or the adoption of another person.

(5) For all purposes, on an adoption order being made, the relationship between the adopted child and any other person is the same as it would be if the adopting parent were the biological mother and biological father of the adopted child.

(6) Subsections (2), (4) and (5) do not apply for the purposes of the laws relating to incest and to the prohibited degrees of marriage to remove any persons from a relationship in consanguinity that, but for this section, would have existed between them.

(7) A marriage between 2 persons is prohibited if, as a result of an adoption order, the relationship between them is such that their marriage would be prohibited by the law respecting those relationships that bars the lawful solemnization of marriage.

(8) This section

(a) applies and shall be deemed always to have applied with respect to an adoption made under any enactment heretofore in force, and

(b) is binding on the Crown for the purpose of construing this Act and the rights of succession affecting adopted children,

> but nothing in this section affects an interest in property that has vested in a person before the making of an adoption order.
>
> (9) An adoption order terminates any other order made under this Act except a restraining order made under section 28.[4]

The same basic statutory provisions exist in the British Columbia Adoption Act[5] with two supplementary details in ss. 11(5) and 11(6) which provide that the "status, rights, privileges, disabilities and limitations of an adopted Indian person acquired as an Indian under the Indian Act (Canada) or under any other Act or law are not affected by this section" and which further provide that the section must be read "subject to" the provisions of any Act which distinguishes between persons related by adoption and persons not so related.

In Manitoba various amendments to child welfare legislation have brought that province into the (b) category discussed earlier. The current relevant section provides that subject to rights vested prior to the final adoption order, upon the granting of an adoption order, "all rights, duties, and obligations between the child and his natural parents or his prior adoptive parents and guardians, and all

rights of the adopted child to inherit as a lawful lineal descendant of a deceased natural parent under the Devolution of Estates Act, cease to exist under law, and the relationship newly constituted by the order is valid for all lawful purposes and has the same effect as if the child had been born to the adopting parents."[6] The child's name becomes that of the adopting parents.[7]

New Brunswick, in the years between 1972 and 1985, has also significantly amended its legislation which now provides that an adoption order "for all purposes, including inheritance from the kindred of the adopting parent, gives the adopted child status as a child of his adopting parent, and the adopting parent status as the parent of the adopted child, as if the child had been born to the adopting parent,"[8] gives the child the surname of the adopting parent (unless ordered otherwise), and "severs the tie the child had with his natural parent or guardian or with any other person in whose custody the child has been, by divesting the parent, guardian, or other person of all parental rights in respect of the child, including any right of access that is not preserved by the court, and freeing that person from all parental responsibilities for the support of the child; frees the child from all obligations, including support, with respect to his natural parents; and unless specifically preserved by the order in accordance with the express wishes of the natural parent, severs the right of the child to inherit from his natural parent or kindred."[9] An adoption order, however, does not terminate

or affect any rights the child has that flow from his cultural heritage, including aboriginal rights.

In Newfoundland, the adoption order has three basic consequences: divesting the natural parent or guardian of legal rights and freeing him of legal duties and obligations in respect of the child, making the adopted child "to all intents and purposes" the child of the adopting parent, and imposing upon the adopting parent all legal duties and obligations as if they were the natural parents as from the date of the order.[10] The child normally receives the surname of the adoptive parents; change of Christian name is also provided for. Furthermore, in Newfoundland, section 21 of the Adoption of Children Act stipulates, regarding the right to inherit property, that an adopted person "upon the intestacy of an adopting parent, [shall] take the same share of property which the adopting parent could dispose of by will as he would have taken if born to the parent in lawful wedlock" and further that [the adopted person] shall stand "in regard to the legal descendants but to no other kindred of the adopting parent" in the same position as if he had been born to the adopting parent. If an adopted person in Newfoundland dies intestate, his property acquired from his adoptive parent (whether by gift, inheritance, or descent) is distributed according to intestate succession legislation to those who would have been his kindred had he been born to the adoptive parents in lawful wedlock and his property acquired from his natural parents or kindred is distributed

as if no adoption had taken place (since in Newfoundland the adopted child does not lose his right to inherit from his natural family).[12]

Nova Scotia's provisions are very similar to those found in Alberta and British Columbia.[13] Quebec's Code Civil Articles 626 - 630 (Section III, "On the Effects of Adoption") also provide the same general outlines as most English provincial statutes.[14]

In Saskatchewan, section 60 of the Family Services Act provides that the order for adoption shall divest the natural parent of the child of all legal rights in respect of the child and free him from all legal obligations and duties as to the child's maintenance and shall make the child for all purposes the child of the adopting parent "as though the child were a child born to the adopting parent in lawful wedlock."[15] If the adoption is a step-parent adoption, the spouse of the adopting parent is not divested of parental rights and the adoption order gives to the adopting parent and the spouse (natural parent) "the same rights and obligations with respect to the custody, guardianship and maintenance of the child as if both were the natural parents and the same powers, rights, and duties as joint guardians under subsection (1) of section 22 of The Infants Act."[16] Section 61 specifically addresses the question of rights of succession to property from or through the adopting parent "as though the person adopted had been born to such parent in lawful wedlock."[17] If the adopted person dies intestate, his property is disposed of as though

he had been born to his adoptive parent in lawful wedlock.[18]

In the two territorial jurisdictions, the Northwest Territories provides for the same effect on status as we have noted in Alberta, British Columbia, Nova Scotia, Ontario, and Prince Edward Island.

Provisions in the Yukon Territory's Children's Act regarding the legal effects of an adoption order are almost identical to those in the Alberta section set out above.[19]

Thus we can see that in a general sense, the trend has been for legislative amendments to continue to shift the total adoptive family into the legal position (re status, inheritance, etc.) as was previously enjoyed by the natural family. There remains, however, quite evidently a crucial need to study each particular statute and each particular section and subsection of the statute with extreme care; for where there are gaps in the statute's wording, the courts will of necessity have recourse only to the common law. Since the common law never recognized adoption, the adopted child thus becomes a kind of statutory-common-law "hybrid", with one foot perched on the lowest branch of his "new" family tree and the other firmly entangled in the roots of his "old" one. With this proviso in mind, we next turn our attention to a discussion of the specific problems which arise (or which have commonly arisen in the past) flowing from the issuance of a final order for adoption.

Adoption and Property Rights

Quite probably the most litigious issue historically arising in the post-adoption phase is the question of inheritance and succession to property by and from the adopted child. The general rule now is that an adopted child is treated as the natural child of his adoptive parents for all purposes of testate and intestate succession and acquires the full right to inherit from his adoptive parents' kin as if he had been born in lawful wedlock to his "new" parents. From the date of the adoption order he ceases to be regarded as the child of his natural parents "for all purposes" and thus is no longer considered as related to anyone else through his parents by birth. However, although the "general rule" seems to be quite clear and easy enough to interpret, in reported Canadian cases dealing with testamentary and other dispositions of property since the time of the earliest adoption statutes, the incredibly convoluted and complicated discussions of whether the words "child" or "niece" or "descendants" or "issue" include an adopted child provide the adoption researcher with literally reams of paper, all in the end very dependent upon the precise wording of the statute in question, the precise wording of the instrument purporting to dispose of the property, and the particular facts of the case.

Hughes refers to the common law rule of construction which provided

that "in the absence of some statutory indication to the contrary, references in a statute to the relationship of parent and child and other relationships flowing from it refer to the relationship of a child born in lawful wedlock, thereby excluding illegitimate, foster, adopted and step-children."[20] As Kennedy further explains the rule: "As a rule of construction, it gave way to a contrary intention, of which evidence was supplied by the testator or other maker of the document. Further, the rule did not apply where the court held that the maker must have intended to benefit the tainted offspring (sic), be they of an illegitimate, step, foster, or adopted relationship."[21] Although some jurisdictions specifically provide a statutory definition of "child" or "issue" (Newfoundland, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan) in an attempt to address the problem, this is not necessarily helpful since by specifically mentioning "child" or "issue," terms such as "descendants," "nieces and nephews," or "grandchildren" may have been unintentionally excluded.[22] If the relevant statutory section provides that the adopted child is to be "for all purposes" the child of the adopting parents, this is usually sufficient to bar the use of the common law rule of construction and allow the adopted child to inherit.

It should be noted that litigation over inheritance and succession is no longer as prevalent in Canada as it was during the thirty years from 1930 to 1960. Most testators (and presumably most lawyers) are now very aware of the potential problems posed in some jurisdictions

by the wording of the statutes relating to adoption and those relating to wills and intestate succession. Wills today are drafted with greater care; intestate statutes and/or adoption statutes have been amended over the years in order to avoid controversy. In general the legislative provisions in this area, though often slow and cumbersome, have for the most part succeeded in making the position of the adopted child within his adopted family identical to that of the natural child in questions of inheritance. One must also add, however, that it is in this area where subtle prejudice against adoptees seems to show itself (to judge by the fact situations in reported cases), as natural family members attempt time and time again to argue that the adopted child in the family is really no more than a stranger and ought not to take any monetary benefit from his "quasi-membership" in the family (the fact of receiving the family name and maintenance ought to be sufficient, it is suggested).

Several Ontario cases (now old but still interesting) may serve to illustrate the various problem situations regarding adoption and inheritance when there is a will.

In the Supreme Court of Canada decision of Re Clement, Gardner v. Gardner[23], for example, the testator had died in 1904, prior even to the existence of any adoption legislation in Ontario, and had left the residue of his estate to his sister, with the remainder to her issue, other than the issue of her then-husband. If the sister had

no issue, then the remainder was to pass to the children of one of the testator's cousins. The sister divorced her husband, remarried, had no children of her own, but in 1924 adopted a daughter who in turn had three children (two of whom were surviving at the time of the litigation). The testator's sister died in 1960, having been predeceased by her adopted daughter in 1936. The question for the court was whether the surviving grandchildren could take the remainder, being the "issue" of an adopted child.

The Court looked at the legislation in force at the time of the adopted daughter's death (1936), which provided that the expressions "child," "children," and "issue" in a will applied to adopted children and their issue only when the will was that of an adopting parent (and not, as here, an uncle by adoption or some other kin) and was made after the adoption order. Thus at the date of her death, the adopted daughter was not "a child" nor were her children "issue" of the testator's sister for the purposes of the construction of the will. The Child Welfare Act (enacted 1958) provisions in force at the time of the hearing, which gave an adopted child and its issue the status "for all purposes" of a child born in lawful wedlock and its issue, had no application to a person (such as the adopted daughter of the testator's sister) who was already dead when the Act was passed. Kerwin, C.J.C. further stated that since there was no adoption legislation when the will had been drafted, the testator's intention must necessarily have been to benefit only a child or

children "of the body" of his sister and since there was no one in existence who fitted that description, the remainder must pass to the issue of the testator's cousin.

A second Supreme Court of Canada decision reported contemporaneously with Clement further illustrates the close interconnection between precise statutory wording, precise wording within the instrument, and the facts of the particular case. In Re Gage, Ketterer et al. v. Griffith et al.[24], the testator died in 1921 and left a life estate to his daughter with the remainder to her children. At the time of the testator's death, his daughter had no children, but after the passage of adoption legislation in Ontario she and her husband adopted three. The daughter died in 1959, leaving the three surviving (adopted) children. The question before the court once again was the right of adopted children to take as a class answering the description of "children" when the life tenant dies after the coming into force of the 1958 Ontario legislation regarding adoption status.

Judson, J., in dissent, provides a brief history of adoption legislation in Ontario as it affects the rights of an adopted person to succeed to property, which he terms "a progressive development towards equating the position of an adopted child with that of a natural child."[25] Three stages of development are outlined. During the first period (1921-1927) a right of succession was conferred upon

the adopted child on the intestacy of the adopting parent, and the word "child" was defined as including an adopted child unless the contrary plainly appeared by the terms of the instrument. During the period between 1927 and 1954 the rights of intestate succession for the adopted child were preserved, and "child," "children," and "issue" where used by the adopting parent in any disposition after the making of an adoption order included an adopted child or issue unless a contrary intention appeared. Amendments in 1954 and 1958 marked the arrival of the third period which saw the omission of the express limitations of rights of adopted children to those acquired under "subsequent instruments" and which further acknowledged that an adoption order confers upon the adopted child the same status as if the adoptee had been born to the adopting parents in lawful wedlock. The 1958 legislation applied this formula to every person heretofore adopted under the laws of Ontario.[26]

However, despite Judson, J.'s dissenting opinion, which would have allowed the adopted children to share the remainder, Cartwright, J., for the majority of the Supreme Court, held that although s.75 of the Ontario Child Welfare Act in existence in 1960 gave s.74 ("the adopted child has the status of a child born to the adopting parents in lawful wedlock") applicability to all persons "heretofore adopted under the laws of Ontario," the real question in Re Gage was not one of status but rather one of the meaning of the testator's will. Following the reasoning of Roach, J.A. in the Ontario Court of

Appeal, the Supreme Court of Canada in Gage held that subject to any contrary intention under the language of the will, a reference by the testator to "child" meant a lawful child procreated by the parent named. The governing date for determining the meaning of the term (and whether it can be extended by applicable legislation) is the date of the testator's death--and the law in effect at that time. Thus the adopted children could not take the residue since the Ontario adoption legislation giving them the status of natural children did not have any retrospective effect so as to extend the meaning of "child" used in the will of a testator who had died before the legislation was passed.

Examples of dilemmas of this kind abound in all Canadian jurisdictions.[27]

A further complication involves the position of the adopted child when the parent or ancestor dies intestate. Perhaps the best way to illustrate the problem is to examine several cases. Our example cases come from Manitoba--and are obviously dependent upon the precise wording of the Manitoba statute. However, if we check the reasoning of these cases against Ontario or British Columbia cases, we arrive by analogy at essentially the same result.

One of the most recently reported cases in this area provides an example of the current kind of situation where problems relating to

inheritance may arise in relation to adopted children. In Re Purpur[28], John Purpur had died intestate in 1983, leaving three children and an illegitimate grandchild, the child of a daughter who had predeceased him. The grandchild had been placed for adoption in 1974, and the administratrix brought an application for advice and directions as to whether the grandchild was entitled to share in the estate--or whether, in fact, the adoption had erased any interest the child might otherwise have had under Manitoba intestate succession legislation.

Wilson, J. found that since the right of a person to share in the estate of an intestate ancestor arises only after the death of that ancestor, the relevant law to be considered is the law of succession as at the date of the death of the intestate. The date of the adoption becomes irrelevant. When Mr. Purpur died in 1983, the provisions of s.96 of the Manitoba Child Welfare Act applied, which provided that upon the making of an adoption order all rights of inheritance from the child's former kin ceased. Thus the adopted grandchild in Re Purpur could not inherit.

The situation in Re Purpur was a simple one if compared to the earlier Manitoba case of Re Podolsky and Podolsky et al.[29] which illustrates the previous way of looking at the right of an adopted child to take on an intestacy. Re Podolsky is also a fine example of the "dialogue" between decided cases and statutory amendment in the

adoption field.

In Podolsky the facts are again typical of a situation which commonly arises in contemporary society (especially since the passage of the 1968 Divorce Act). John and Ruth Podolsky had two daughters, and were divorced in 1969. John never remarried, but Ruth married George Kosowan and in 1970 the Kosowans adopted the two daughters of Mrs. Kosowan's first marriage. When John Podolsky died intestate in 1979, survived by his mother and his two daughters, the question of who should succeed to his estate was immediately apparent. The basic intestate succession statute provided that if an intestate died leaving "issue" but no spouse, the estate would be distributed "per stirpes among the issue," "issue" being defined as including "all lawful lineal descendants of the ancestor." If there were neither spouse nor issue, then the estate was to go to the deceased's parents in equal shares or in full to the survivor if one parent was already deceased.[30]

The question then was whether the two Podolsky/Kosowan daughters were "lawful lineal descendants" of their natural father despite their having been adopted by their mother's second husband.

In his detailed case comment on the Podolsky case[31], Harvey explains that up until 1974, on one basis or another, adopted children in Manitoba (like adopted children today in Newfoundland) had dual

intestate succession rights to the estates of both their natural and adoptive parents.[32] However, in 1974 the Manitoba legislature greatly amended the Child Welfare Act, incorporating the following version of s.96 (greatly truncated if compared to the previous legislation):

> Effect of adoption order.
>
> 96(1) Upon the granting of an adoption order under this Part all prior parental ties of the child cease to exist under the law, and the relationship newly constituted by the order is valid for all lawful purposes and has the same effect as if the child had been born to the adopting parent(s).
>
> Surname of child.
>
> 96(2) An adopted child takes the surname of his adopting parent(s) unless the adopting parent(s) requests that the child retain the surname under which his birth is registered.

In 1979 s.96 was further amended (resulting in the current wording);[33] however, the 1979 amendments only came into effect after John Podolsky's death and thus could be ignored when the central issue was addressed and which was stated as follows: "When a natural parent of

an adopted child dies intestate after 1975, do rights of inheritance from natural parents, which were formerly guaranteed to children adopted (...) before 1974 under The Child Welfare Act (...) s.96(2), survive the amendments of the (...) Act by the deletion of (...) s.96(2)?" Deniset, J., without giving reasons, held that the rights did survive and thus John Podolsky's estate should pass to his daughters.

The decision was appealed to the Court of Appeal of Manitoba, where counsel for John Podolsky's mother argued that the only inference to be drawn from the changed wording of s.96(1) and the total omission of "old" s.96(2) was that the 1974 changes to The Child Welfare Act had indeed effectively ended the Podolsky (now adopted) daughters' status as lawful lineal descendants of their natural father.[34] However, the Court of Appeal upheld the trial judge's decision. O'Sullivan, J.A., in his judgment reasoned as follows: (a) that the "old" s.96(2) only guaranteed or recognized succession rights in adopted children to the estates of their natural parents; it did not "create" such rights since they existed by virtue of the The Devolution of Estates Act and repealing a guarantee of a right does not repeal the right itself; (b) that lineal descendancy is a matter of fact and not a "parental tie" severed by s.96(1) of the "new" legislation; thus adopted children had not suddenly been transformed from lawful to unlawful lineal descendants merely on the granting of an order for adoption; and finally (c) that the 1974 legislation

applied only prospectively and could not govern a 1970 adoption.[35] Thus the daughters took.

This result provoked much comment and reaction in Manitoba.[36] Harvey argues strongly that the relevant law in a case like Podolsky is the succession law in place at the date of the intestate's death (which makes the date of adoption irrelevant as well as the question of whether changes to the legislation by which the children were adopted apply prospectively or retrospectively).[37] He also makes the eminently sensible point that if the legislature wishes to sever succession rights as between natural parents and adopted children, it should say so in express terms.[38]

Bolton, however, points out that an amendment to The Devolution of Estates Act changing the definition of "issue" (if that is the intention of the legislature) would be inappropriate since The Child Welfare Act is clearly the statute which defines the process by which children can be adopted and which further defines the effects of such a relationship: "It [The Child Welfare Act] is certainly effective in destroying such basic rights as custody and (in most cases) access rights between adopted children and natural parents. Why then, one might ask, should succession rights be treated so differently?"[39] She refers to the previous decision of O'Sullivan, J. in Hillier and Hillier v. Williams[40] where in obiter he stated: "The evidence is that the natural father is a man of some means. To deprive the

children of their right to inherit from him would not be to their advantage, especially if they are to have a continuing relationship with him."[41] Here, as Bolton quite rightly points out, O'Sullivan was of the opinion that an adoption order does sever succession rights--a totally opposite interpretation of the effect of the adoption order as seen in Podolsky - yet perhaps consistent, nonetheless, with his apparent opinion that the right of an adopted child to inherit from his natural parent is a "right" worthy of protection and a right which is inevitably in the child's best interest to maintain. Bolton disagrees with this position (as would the majority of writers who have studied the "psychological" effects of the adoption process on children) and suggests that this insistence on the child's "right" to monetary benefit may be at the expense of his emotional stability and/or the stability of the adoptive family he now belongs to. A more realistic attitude toward what is in the best interests of the adopted chid, it is submitted, is the reading of s.96(1) as the simple statement that it is the adoptive parents and not the natural parents who are the child's parents "in law." Thus succession links to the natural families (even if beneficial), like other links, should not remain.

Indeed, as a result of Podolsky and the resultant controversy over its interpretation and the "intent" of the Manitoba legislature, the Manitoba Child Welfare Act was further amended in 1981 and in 1984 so that it now makes the position quite clear:

Effect of adoption order.

96(1) Subject to subsection (3), upon the granting of an adoption order under this Part all rights, duties and obligations between the child and his natural parents or his prior adoptive parents and guardians, and all rights of the adopted child to inherit as a lawful lineal descendant of a deceased natural parent under The Devolution of Estates Act, cease to exist under the law, and the relationship newly constituted by the order is valid for all lawful purposes and has the same effect as if the child had been born to the adopting parents.

96(2) An adopted child takes the surname of his adopting parents unless the adopting parents request that the child retain the surname under which his birth was registered.

96(3) Nothing in this section affects rights that have vested prior to the adoption order being granted.[42] (emphasis mine)

Succession rights of the adopted child to the estate of a natural

parent are cancelled out with the granting of the final adoption order. Podolsky would have a completely different result were it to be decided today, yet it is thanks to the problem exposed by the facts in the Podolsky case which resulted in the legislative amendments which currently make the matter clear (and thus non-litigious).

As previously noted, reported cases involving a problem of inheritance or succession relating to the process of adoption are on the decline. As it is not within the scope of this study to present a complete historical analysis of the specific legislative amendments to each individual provincial adoption statute, we shall leave this area and turn our attention to an examination of the legal effects of adoption on the adopted child's status as it affects his personal rights, for example, his capacity to marry, his right of access to his natural parent, and his right to information concerning his origins.

Adoption and the Capacity to Marry

The fascinating Alberta case of Re Broddy and Director of Vital Statistics[43] serves to illustrate a problem which, although still a rarity, may become more common, especially in a time when step-parent adoptions are routinely granted in many Canadian jurisdictions.

In Broddy the facts were as follows: Scott Broddy, Clayton Broddy's brother by adoption, and Kimberley, Clayton Broddy's daughter by (step-parent) adoption (uncle and niece by adoption) wished to marry. However, they were refused a marriage license in Alberta because the Alberta Child Welfare Act in force at the time of their application provided that upon adoption the child becomes "for all purposes" the child of the adopting parent and that relationships to other persons must be determined accordingly. Thus an uncle and niece, even though uncle and niece by adoption only, are prohibited from marrying.

The argument advanced at the trial (an application for mandamus to compel the issuance of a marriage license) was that references in the prohibited degrees are solely to relationships arising from blood or marriage and that to interpret the degrees so as to include relationships created by legislation concerning adoption would allow a provincial Legislature to encroach upon the federal ground which gives power to the Dominion to legislate regarding the capacity to marry.

Dea, J. in refusing to grant the application for mandamus, made a distinction between Lord Lyndhurst's Act (source of the prohibited degrees), which directs itself to the issue of capacity to marry, and whose primary concern is to prevent the marriage of those who are in close relationship with each other, and adoption legislation, which has as its main purpose the welfare of the child. In order to attain

its principal object, adoption legislation may indeed "change the status" of the child, which change affects, of necessity, all five sets of persons involved in the adoption process.

Obviously seeing the problem as a potential conflict between provincial and federal legislation, Dea, J. concluded:

> It seems to me that when the law respecting the prohibited degrees and the law respecting adoptions are so viewed, no conflict is disclosed between the provincial and Dominion laws. The Dominion law sets forth the prohibited degrees of marriage. The proyincial law determines the legal status of the applicants. In applying the Dominion law it is proper to make reference to the legal status of the applicants as that legal status is established by provincial law. To suggest that the prohibited degrees should be interpreted or construed as if the legal status of the applicants as established by provincial law was of no force or effect is unwarranted and without merit.[44]

On appeal to the Alberta Court of Appeal, Kerans, J.A. defined three issues to be decided" (a) whether a province is constitutionally

competent to prohibit, as part of an adoption law, marriage between adoptees and their adoptive relatives; (b) whether such a prohibition would be inoperable because of paramount federal law; and (c) whether Alberta had enacted such a prohibition.[45] On issues (a) and (b) Kerans, J.A. found that a province may indeed legislate regarding the effect of adoption on marital capacity (even though such legislation would "incidentally affect" federal jurisdiction under marriage and divorce) and further that if a province were to legislate that adoptive relatives could not marry, for example, the legislation would not be ultra vires the province. Since no conflict would exist with federal legislation (since each law could be obeyed without disobeying the other), such a law would be both materially and formally good.

On the third issue, however, Kerans held that the province could not prohibit the marriage of an uncle and niece by adoption by simply "deeming them to be in a prohibited category in a federal law."[46]

> In sum, it is one thing to create a status which existing federal law recognizes or to define a prohibition supplementary to a federal prohibition; it is quite impossible, however, for a province actually to amend federal law. The clear legislative intention here was to create a new status for an adopted child, as near that of

> a natural child as possible, and therefore to which the traditional prohibitions should be applied. But, notwithstanding this clear intention, there is a legislative gap. The provincial legislation, viewed alone, simply does not offer any prohibition consequent upon adoption. Nor, viewed alone, does the federal law. The provincial legislation, read down, does not fill the gap. In the end, neither federal nor provincial law forbids the applicants to marry. The director therefore had no lawful reason to deny them a licence, and a writ of mandamus should go to force him to give them a licence. Accordingly the appeal must be allowed.[47]

From the Court of Appeal decision in Broddy, it would thus appear that "any provincial adoption legislation purporting to define the federal law in question, or to insert into that law additional categories, would be an abortive attempt to amend that law."[48] Presumably, though, the province could legislate its own prohibition which would be both formally and materially correct.[49] In any case, since no Canadian jurisdiction to date states expressly in its adoption legislation that marriages are prohibited between persons in specific adoptive relationships, on the reasoning of the Alberta

Court of Appeal in Broddy they would not be prohibited anywhere in Canada.

In his detailed examination of the Canadian situation regarding marriage prohibitions, Hubbard classifies adoption as it relates to the prohibited degrees as "confusion compounded." He notes that the adoption legislation of half the provinces contains an express reference to the laws of incest and the prohibited degrees (Alberta, British Columbia, Nova Scotia, Ontario, and Prince Edward Island) while the other provinces and territories make no mention of them (Manitoba, New Brunswick, Newfoundland, Quebec, Saskatchewan, the Northwest Territories, and the Yukon). The purpose of the legislation, whether or not there is an express reference to the prohibited degrees, is to place the child in the same position "as if" he had been born to his adoptive parents in lawful wedlock rather than born to his biological parents. In Hubbard's words: "We are dealing with a legal fiction whose purpose is clearly to parallel consanguinity rather than affinity (....) [T]hese provisions deem these parties to be biologically related, and deem that the adopted child and his natural kin are not biologically related."[50] According to Hubbard's reasoning, there is no prohibition in Canada attaching to those persons deemed to be biologically related, only prohibitions which attach to those actually biologically related, whether legitimate or not. Archbishop Parker's Table of prohibitions only shows two kinds, natural and artificial. Relationships of the "deemed blood" are not

included, and marriage between such persons involves no eugenic problems nor are they affected by the "general sense of revulsion" "regular" marriages of this kind might engender. As for the artificial relationships and their effect on capacity to marry, these arose at common law by operation of law upon marriage. However, "the artificial relationships established by operation of law through the device of legal adoption, being unknown at common law, did not affect capacity to marry."[51] Thus "if adoption is to operate as a third class of relationships within which marriages are to be prohibited," there would have to be legislation to that effect.[52]

Hubbard cites the complications which multiply when one considers the various provincial adoption statutes as they relate to recognition of adoptions from other provinces and the determination of the validity in one province of an adopted person's marriage contracted in another. He cites the Nova Scotia provision (which is essentially the same as Newfoundland's):

> 28. When a person has been adopted in another province, state, or country according to the law of that place, and while domiciled or resident there or having been born there, or while his adoptive parent was domiciled or resident there, he and his adoptive parent have for all purposes in the Province the same status, rights and

> duties as if the adoption had been in accordance with this Act.[53]

Not only does this provision leave unclear the status of the adoptive parent and the adoptee where both of them are no longer domiciled or resident in the place of adoption, but it also seems to indicate that the relationships of brother, sister, uncle, aunt, nephew, or niece by "foreign" adoption are not recognized.

> For example, if provincial legislation is taken to affect such federal matters, sexual intercourse between a man and a woman adopted by his parents in another province would be criminally incestuous in every province but [Nova Scotia and Newfoundland]. A man and a woman deemed to be his sister by an adoption in Ontario, for example, would lack the capacity to marry in that province. But apparently they could go to Nova Scotia or Newfoundland and get married. Neither the consummation of, nor a naughty anticipation of, that marriage would be criminal if it occurred in either of those provinces. But their marriage would be void ipso jure in Ontario, and it could be so treated in any action in that province in which its validity should arise,

> whether they are parties to the action or not. And if they returned to Ontario and had the temerity to indulge in marital intercourse there, they would be guilty of the crime of incest.[54]

Things worsen if the effect of a subsequent adoption order is considered. In a jurisdiction where there is no provision dealing with the effect upon the earlier order of adoption by a subsequent one, (ie., no "wiping out" provision applying to a previous adoption in the way an adoption order applies to the child's natural family relationships), the situation would appear to engender ludicrous results. Since an adoption order expressly does not apply so as to remove anyone from a relationship for the purpose of the laws pertaining to incest and prohibited degrees of marriage, and since the first adoption supposedly created such relationships, the second adoption would presumably not remove them. Thus a man could marry his former sister-by-adoption in Manitoba, but she would be added to his personally prohibited list in seven other jurisdictions.[55]

The final complicating factor pointed out by Hubbard is the trend for the child to have only one adoptive parent (either from a single-parent application initially or as the result of the divorce of the adoptive parents or the death of one of them). We quote in full his hypothetical situation:

> Suppose H and W adopt a son, S. W dies and H marries X who has two daughters, D and E. S and D are in their late teens and do not wish to be adopted by either X or H, respectively. But E is much younger and is adopted by H. Assuming there were no other impediments to such an eventual union, S could marry D; and sexual relations between them would not be criminal, but he could not marry D's sister E, and sex with her would be the crime of incest. Although sexual intercourse between H and E would be incestuous, his intercourse with E's sister D would not be the crime of incest. However, because D is his step-daughter, sexual relations with her might involve him in the non-incestuous lesser offence of illicit sexual relations with a step-daughter, a crime punishable by up to two years imprisonment.[56]

Thus we see that although the result in Broddy seems "right," the reasoning therein is not totally convincing (especially given the Supreme Court of Canada's decision in Natural Parents). The potential Broddy scenarios as illustrated by Hubbard's hypothetical cited above point to a need for legislative reform in this area. It is arguable, following Broddy, that there is no prohibition in our

present law against marriage of persons related by adoption only, but in Hubbard's words: "The point is not unequivocal, and federal legislation should deal with it expressly."[57]

The Australian position is to treat the adoptive relationship just as it treats the relationship of consanguinity for the purpose of determining a person's capacity to marry. Since all the members of the family are in the closest proximity, it would appear that the taboo against incest would still be present: "The family ambiance, including the inculcation of an aversion to incest, should be the same for the adopted child as for the natural child."[58]

However, the English position is slightly different, since although the marriage of an adoptive parent and his adopted child is prohibited, English law does allow for the marriage of the adopted child and the natural child of the adoptive parents.

Hubbard argues that Canada should follow the Australian lead in eliminating all prohibitions of marriage save those of "biological siblings and persons related lineally either by consanguinity or by adoption"[59] since the historical justification for the existence of the prohibited degrees is founded on religious and moral views and even scientific (genetic) considerations which have virtually no force in contemporary society.

Adoption, Custody, and Access

As we have already seen, an order for adoption in all Canadian jurisdictions takes the right of custody from the natural parent and vests it in the adoptive parents. The right of custody, it would appear, is lost whether that right arises by way of common law, statute, or court order. Thus any custody order in existence with regard to the child automatically lapses on adoption without the necessity of being discharged by the court.[60]

The English case of Crossley v. Crossley[61] illustrates the effect of an adoption on a prior existing custody order. In that case the mother had received custody of the child on divorce but with the proviso that she must apply to the court for leave to take the child out of the jurisdiction. She later remarried and she and her second husband adopted the child of the first marriage. When Mrs. England (the former Mrs. Crossley) dutifully applied to the Court for an order allowing her to take the child from the jurisdiction, it was held that the provisions of the custody order were no longer applicable since upon adoption the child had become a child of the Englands, not the Crossleys.

It would seem logical to most that upon adoption the right of custody must of necessity be taken from the natural parent and transferred to the adoptive parent since it is, after all, the concept of "custody"

which defines in a very real sense the relationship of parent and child. In adoptions where the child moves from Family A (natural parent(s)) to Family B (adoptive (stranger) parents), the process is clear-cut. But what of cases in which the child moves from Family Y (natural parent with custody on divorce) to Family Z (natural parent with custody and new spouse)? What of the parental rights (if any) still remaining in the "other" natural parent?

We have discussed at some length in Chapter II the problems involved in the area of step-parent adoptions (the scenario outlined in Family Z above), there focusing on the issue of consent. In the movement from Family Y to Family Z the problem is eliminated (a) if the "other" parent obligingly gives his consent, or (b) if the Court exercises its discretion and dispenses with it. The reluctance, however, of many "other" parents to grant consent to adoption and the reluctance of many courts to dispense with that parent's consent to adoption would seem to be based on the uncertainty as to whether an access order (as distinguished from a custody order) in favour of the natural parent can survive the granting of a final order of adoption.

It would seem that in Canada there is no single position concerning the survival of an access order subsequent to the granting of an order for adoption; and when deciding the issue of access rights in these cases, the courts have had to resolve two questions: (a) whether as a matter of law there is jurisdiction to allow the access;

and (b) whether on the facts of the case it is appropriate to grant access. The issue of whether a court has jurisdiction to allow access to a natural parent after adoption is a complex one, and thus it is hardly surprising that courts have not shown unanimity in their decisions.

One factor which is crucial to the final outcome is the particular legislation in question. It has been held, for example, that in a situation where a child who was the subject of an order under the federal Divorce Act and who is then adopted (usually in a step-parent adoption), the access order (because it derives from a federal statute) takes precedence over the limitation (cancellation) of access resulting from the adoption legislation (which is provincial).[62] The constitutional doctrine of federal paramountcy would appear to be the underlying justification for this point of view. However, it has also been held that provincial adoption legislation which purports to make the adopted child "for all purposes" the child of the adoptive parents (as if born in lawful wedlock) is not affected at all by an access order in existence under the federal Divorce Act or by any provincial order deriving from legislation concerning custody or access of children.[63] Thus, in these latter cases, the general "statutory death and rebirth" philosophy of adoption (ie., the creation of a totally new family for the child) would appear to serve as the basic motivation. Just as in the case of refusing to dispense or dispensing with the natural parent's

consent to adoption, the division of opinion here, too, seems to be between past-oriented and future-oriented judges. Those who feel that past ties ought to be severed completely so that the parties can move on with their lives wil refuse access to the natural parent or hold that the adoption order has effectively terminated it. Those who feel that the child's past (especially in the case of a step-parent adoption where the "other" parent's company and emotional support seem beneficial to the child) represents something of value for him will try to allow access to continue post-adoption.

Although it would appear that the courts generally do have jurisdiction to allow access post-adoption (at least if the application is made under the proper statute), they may still do so with the rider that the particular case in question is "unusual" or "exceptional." Adoption with access is still extraordinary in Canada (with the exception, perhaps, of British Columbia). For example, in Re Children's Aid Society of Metro Toronto and C.B.[64], we have this typical statement:

> (...) With the ordinary situation of adoption by a couple who are strangers to the natural parents (...) it is clear that it is neither in the interests of the child who has an opportunity (...) to be adopted, nor in the interests of the adopting parents to have anything short of a

> clear outright adoption without sharing custody or access. Some cases (...) indeed show unusual circumstances such as adoption by a divorced mother and her new spouse, of a child, with consent of the father of that child, with continued access to him.[65]

British Columbia is arguably the Canadian jurisdiction which is most "modern" or liberal in allowing access to survive adoption. In the case of North v. North[66], for example, the parents divorced in 1973 with custody to the father and "reasonable and generous" access of the two children to the mother. The father remarried, and the mother moved to New Zealand; when the father and his second wife applied to adopt the children the mother could not be located and her consent was dispensed with at the hearing. The mother, subsequent to the adoption, reappeared and applied to the British Columbia Supreme Court to have the terms of her access order from the decree nisi defined. MacFarlane, J. held that a right of access does not depend upon a parental relationship and that the Adoption Act provisions deal primarily with the legal status of the natural and adopting parents vis-à-vis the child, not with inter-personal relationships of the natural parents and the child.[67] Thus the court in North held that an adoption order made under provincial legislation does not terminate any rights of access granted by a prior decree nisi of divorce. In the words of MacFarlane, J.:

> In summary, I have concluded that the rights of access of the respondent granted to her in the decree nisi of divorce have not been terminated in the subsequent adoption order and that the welfare of the children is the paramount concern in determining what, if any, right of access ought now to be permitted to the natural mother. Common sense dictates that it is desirable, in most cases, that there be a complete break, but there are obviously cases where that general rule need not be applied.[68]

Another British Columbia case (decided prior to North) was Kerr v. McWhannel and McWhannel.[69] In that case (an appeal from an order for adoption which had been granted to the child's mother and her second husband) the facts were rather complicated. The child was born out of wedlock in 1963, and the same year the child's mother had married Mr. Kerr (who was not, however, the father of the child). For five years the child (not adopted) lived with his mother and her husband and apparently enjoyed a good relationship with his "step-father." In 1969 the parties commenced divorce proceedings during the course of which the husband applied for and obtained an order granting him access to the child. At trial, two years later, the issue (apart from the divorce itself) was whether the husband should be granted

access as a person who stood in loco parentis within the meaning of the Divorce Act. He was granted access, and the mother subsequently remarried in 1971, applying in 1972 with her second husband (McWhannel) to adopt the child. The adoption was granted, but Mr. Kerr applied to have it set aside. His appeal was dismissed, MacFarlane, J.A. holding that s.2 of the Divorce Act gives a special meaning to the word "child" for the purpose of that Act alone and those provisions of the Divorce Act which are ancillary to divorce; the s.2 definition in the Divorce Act does not, however, confer on a person who stands in loco parentis to a child the status of "parent" for purposes of s.8(1)(c) of the British Columbia Adoption Act (required consent of parent to adoption). However, in Kerr v. McWhannel, on the question of Mr. Kerr's access rights, MacFarlane, J.A. stated that the adoption order did not terminate the rights given him in the divorce proceedings:

> I see nothing inconsistent in the child's being adopted by the respondents while at the same time the appellant retains his rights of access. Adoption affects legal relationships of the child. Custody and access rights can be given in the proper case to persons who have no legal relationship to the child involved.[70]

Two other British Columbia cases will further serve to illustrate the

liberal attitude taken by the courts in that jurisdiction concerning the rather anomalous mixing of access and adoption.

The 1979 case of Re Female Child, British Columbia Birth Registration No. 74-09-131763, Re Adoption Act[71] also concerned a step-parent adoption where the mother and her second husband sought to adopt the child of her first marriage. Melvin, L.J.S.C. reviewed the British Columbia authority and reiterated the proposition that "the weight of authority in this province is to the effect that the adoption order does not interfere with prior rights of access granted to a parent under the provisions of an order nisi granted in divorce proceedings."[72] In Re Female Child the parties had even agreed to the continued access by the natural father, and the judge thus held that given the consent of the parties and the fact that the child was the "natural child" of the respondent, the adoption order should state on its face the specific order for access by him.[73]

The most recent British Columbia case concerning adoption and access is Bosworth v. Cochran and Cochran.[74] This case involved an application for access under s.35 of the Family Relations Act, R.S.B.C. 1979, c. 121, by the natural father of a child who had been adopted by the mother and her second husband. At the original adoption hearing the consent of the natural father had not been required since he and the child's mother had never married (and consent of the putative father to adoption is not required by the

British Columbia statute). However, he had been notified of the proceedings and had entered an appearance through counsel stating that he did not oppose the adoption but that he did wish to continue to enjoy access to the child. Apparently nothing was done regarding his access at the adoption hearing, and the adoption order was duly entered. The natural father then applied under the Family Relations Act and was opposed by the Cochrans who argued (flying in the face of British Columbia authority) that any right of access the father might have had had been extinguished by the adoption order. In order to succeed under s.35, they argued, the application should have been made prior to the adoption; and even if it had succeeded then, the adoption order would have terminated it.

Obviously Mr. Bosworth's position as a putative father made the court's job a bit more difficult, but Murphy, J., after canvassing a great many authorities, granted him an order for access:

> It would appear that s.35 of the British Columbia Family Relations Act is wide enough to encompass claims for access or custody of legitimate children who have never been adopted, and who may still live with their natural parents. This being so, I cannot see how an intervening adoption order can give adoptive parents any greater right to resist an application on the

basis of status than natural parents.[75]

Thus the position in British Columbia would appear to be that an adoption order neither terminates a previous access order nor bars the possibility of a successful access application by a child's former natural family under provincial legislation. The position in the other provinces is, however, quite different.

For example, in W. v. H. and Attorney General of Alberta[76] (commonly known as Williams v. Hillier), the Alberta Court of Appeal reached exactly the opposite conclusion. In the divorce proceedings the mother was awarded custody of the two children and the father was granted reasonable access. The mother remarried, and she and her second husband adopted the children in Manitoba, the adoption order being granted pursuant to the relevant Manitoba adoption legislation and the Manitoba judge holding that the father's access order would not be affected by the adoption:

> (...) apart from constitutional considerations, in Manitoba, at least, the legal effect of an adoption order is to sever all ties between the adopted child and his natural non-custodial parent and deprive such a parent of any prior right to access he or she may have had. In my view, such a consequence cannot be held to

> prevail where the parent's right of access is derived from a superior and paramount federal statute, in this case the Divorce Act. That is not to say that an adoption order made under provincial legislation is invalid; it is only to say that to the extent such an order conflicts with and, in effect, negates an access order made under the Divorce Act, the latter must prevail and co-exist with the rights and obligations conferred by the adoption order.[77]

This decision was appealed to the Manitoba Court of Appeal; but before the appeal could be heard, the Manitoba Child Welfare Act was amended in order to give a county court judge jurisdiction to grant rights of access to children to their natural father after a step-parent adoption. The Court of Appeal thus dismissed the appeal, stating that as to the issue of access it was now open to the father to apply in the Manitoba court for an access order. Mr. Williams at this point obtained leave to appeal to the Supreme Court of Canada on the constitutional issue of whether the access provision under the decree nisi had paramountcy over the adoption order, but this appeal, although apparently fully argued, was "quashed" by the Supreme Court. Rather than apply in Manitoba, however, Mr. Williams chose to apply to the Alberta Court of Queen's Bench (where the decree nisi had been granted) to have specific access provisions fixed during holidays.

The application was dismissed by the chambers' judge, and the resulting appeal to the Alberta Court of Appeal was also dismissed, Laycraft, J.A. stating as follows:

> Where the fundamental issue before the court is not divorce or an incident of divorce but rather some topic of provincial jurisdiction, as, for example, adoption or child welfare or guardianship, I respectfully agree with the approach taken by the Newfoundland Court of Appeal in Re Hutchings (...) A divorce decree, when granted and through all subsequent variations of it, determines custodial rights between the former husband and wife. On a hearing for an adoption order entirely different considerations arise. That order deals with the status of the child and the status of the new parents as parents, and has different parties than the two original contestants in the divorce. (...) While the adoption order may incidentally affect such a right as access granted in a divorce decree, it does so only as an incident of a valid exercise of provincial jurisdiction; it functions with respect to different issues between different parties.

> In my view, in enacting the Divorce Act Parliament did not purport to assert jurisdiction in the provincial fields of adoption or child welfare or guardianship. I do not see, therefore, that any issue of paramountcy arises where the court is dealing with those provincial topics. That is so even though the adoption order (...) may incidentally affect an order made in a divorce action. (...) In my view, the rights of access under the divorce decree were terminated by the Manitoba adoption order.[78]

This judgment of the Alberta Court of Appeal is, it is submitted, the current position in Alberta law as to the relationship between access and adoption.

In the 1980 Manitoba case of Re Z. and B.[79], Mrs. Z. and her second husband applied to adopt her child from her marriage to Mr. B. (who had been given rights of access in the decree nisi of divorce). The adoption was granted (dispensing with Mr. B.'s consent), and Mr. B. appealed to the Court of Appeal of Manitoba where Matas, J.A. held that given all the circumstances of the case, the consent had been properly dispensed with but that the county court judge should have considered the legislative change to the Manitoba Child Welfare Act

which allowed for the making of a separate order for access to the natural parent in a step-parent adoption. Prior to that change a court could not impose a "condition" of access to an adoption,[80] yet the 1979 amendment (s.100) now makes this possible. Thus in Re Z. and B. the matter was remitted to the county court judge for the consideration of granting access rights to the natural father. In his judgment, Matas, J.A. refers to the three Manitoba cases (decided prior to the enactment of the Divorce Act)--Re Pshebnicki Adoption[81], Re Goldstein and Brownstone[82], and R. v. County Court Judge, Ex p. Sobering[83]--which all considered the relationship of an access order in a decree nisi to an adoption order and which all held that the County Court, which has exclusive statutory jurisdiction to deal with adoptions in Manitoba, is not precluded from making an adoption order in the best interests of the child because of the previous granting of an access order to the objecting parent in divorce proceedings. Perhaps the Alberta and Manitoba positions are best summarized by Dickson, J.A., writing for the majority in Sobering v. Sergeant:

> There will be many cases, e.g. the Pshebnicki case, where the parent to whom the visiting privileges were granted does not avail herself of them and it is manifestly in the best interests of the child to permit adoption by the parent to whom sole custody has been granted. The loss of visiting rights is the consequence of the

> exercise of an undoubted statutory jurisdiction.[84]

In another Alberta decision, Smith v. Koch[85], Mr. Justice Miller noted the direct conflict between the wording of the Alberta Child Welfare Act as it relates to the legal effects of an adoption order and the view that under the Alberta Domestic Relations Act a natural parent still has some status and rights to a child even after the adoption order is made should special circumstances exist. He reconciled the apparent contradiction on the ground that the adoption statute deals primarily with the legal status of the natural parents and the adopting parents vis-à-vis the child while the Domestic Relations Act deals primarily with the interpersonal relationship of the natural parents and the child and "solved" the problem by ordering the adoption and making an access order in favour of the child's natural father pursuant to the Domestic Relations Act.[86]

To conclude our discussion of the problems inherent in access after adoption we turn to two Ontario decisions, Re W. and J. et al.[87] and Re Metropolitan Toronto Children's Aid Society and C.B.[88] (quoted at the outset of this section), both of which deal with adoptions by strangers rather than step-parents.

In Re W. and J., the natural mother of a child applied (after the adoption order) under the Ontario Family Law Reform Act for an order

granting her access to her daughter. The application was dismissed in Provincial Court on the ground that the adoption provisions of the Ontario Child Welfare Act were paramount to the access provisions of the Family Law Reform Act. An appeal to the county court judge was allowed, and the matter was remitted to the provincial court judge for rehearing on the grounds that "any person" could apply for an access order. An appeal by the adoptive parents to a High Court judge was allowed on the basis of the "paramountcy" of the Child Welfare Act (thus no access order post-adoption was possible), and further appeal by the mother to the Ontario Court of Appeal was dismissed. According to MacKinnon, A.C.J.O., the Child Welfare Act establishes a comprehensive and exhaustive code for the supervision, custody, access, wardship, and adoption of neglected, abused, and abandoned children. The purpose of the Act's adoption provisions is to ensure a safe and secure environment for the adopted child, the stability and continuation of which should not be immediately threatened by access granted to the natural parents. The new adoptive parents, for their part, are given security from upset and interference by the secrecy provisions of the Act, and these provisions would be rendered meaningless if applications for access by natural parents were permitted. On the making of an adoption order the natural parents cease to be the parents of the child, and the child becomes "for all purposes" the child of the adopting parents. Any conflict between the Family Law Reform Act and the Child Welfare Act must be resolved in favor of the latter. (The only

possible deviation envisaged here is the situation where a natural parent establishes a relationship with the child after the adoption order; then perhaps the natural parent is regarded as "any person" and could apply for access).[89]

In Re Metropolitan Toronto Children's Aid Society and C.B., the children had been made wards of the Children's Aid Society, and attached to the order was the right of access to the two children to the mother. The society applied to terminate the right of access, and at the hearing the mother appeared in person. The society's application (which was made, presumably, to free the children for adoption) was refused by Gravely, Prov. Ct. J.; but on appeal Wren, Co. Ct. J. allowed the society's appeal on the grounds that further delay might prevent the children's adoption:

> (...) with the ordinary situation of adoption by a couple who are strangers to the natural parents (...) it is clear that it is neither in the interests of the child who has an opportunity (...) to be adopted, nor in the interests of the adopting parents to have anything short of a clear outright adoption without sharing custody or access. Some cases (...) indeed show unusual circumstances such as adoption by a divorced mother and her new spouse, of a child, with

> consent of the father of that child, with continued access to him.[90]

Thus we have come full circle in our discussion of the legal issues regarding adoption and access and the various approaches taken by Canadian jurisdictions. However, we ought not to forget that "to a child, caught in the middle of an adoption-custody-access dispute, the existence or non-existence of certain legal relationships, abstract and unanswerable moral speculations, are all meaningless."[91] While it may have been eminently desirable to completely sever the parent-child relationship in a time when most adoptions were of illegitimate infants placed with the mother's consent or placements through uncontested Crown wardship proceedings, today many adoptions deal with children who may be "severed" from access to a natural parent whom they have known and loved for years. Obviously the original goals for adoption are in the process of changing; thus greater flexibility is needed in the area of access as it relates to the adoption process in order to serve the child's best interests in fact as well as in theory.

Adoption Orders and the Confidentiality of Adoption Records

The final area of controversy which we shall examine in this chapter is the legal effect of an adoption order in Canada as it relates to the adopted child's right to know the history of his origins, the

natural parents' right to know the fate of the child surrendered for adoption (or the right to have their privacy protected and to know nothing), and the adopted parents' right (desire) to maintain a stable family unit. Prior to the 1970's this "problem" with the so-called "sealed records" policy was essentially non-existent since most adoptions were in many respects shrouded in secrecy. Adoption was still a "different," not totally acceptable way of creating a family, and adoptive parents usually avoided publicizing the fact that their child was adopted. Even adopted children themselves often remained totally unaware that the parents they had known since infancy were not their "real" parents (since despite the fact that all professionals who work in the adoption field strongly advocate telling the adopted child that he is adopted, many adoptive parents cannot do so or refuse to do so). In the case of illegitimate births thirty years ago, the natural mother quite often went to great lengths to conceal the fact of her pregnancy; and although there are touching accounts of the natural mother's emotional upset at the surrender of her baby, it is obvious that she fully realized or accepted as given that the surrender was permanent and that she would have no future contact with her natural child.

We have spoken previously of the basic underlying principle in adoption law, that of the statutory death and rebirth of the child. However, it has also become clear that this legal fiction does not, cannot, function to eradicate the fact that the adopted child in fact

is different from a child who has never been adopted. He has, in fact though not in law, two sets of parents; and at some stage in his development he will undoubtedly want to know what his origins are. This is not to say that adopted children do not for the most part consider their adoptive parents to be their mother and father; it is simply that there would appear to be a deep-seated need to know about the other two persons who were in a very significant way "responsible" for the adopted child's life.

Since the 1970's, with the advent of numerous "parent finder" groups and a much greater public awareness and openness about the adoption process in general, the question of sealed records versus open disclosure systems has become the subject of vast outpourings in both the popular press[92] and in professional journals.[93] Once again we can begin to see the "dialogue" set up between the public, the legislature, and the courts. The Manitoba Law Reform Commission reported in 1979 that the challenge in this area is "to strike a proper balance between the desirability on the one hand of preserving the anonymity of the parties and the desirability, on the other, of ensuring that adoptees and biological parents who desire to acquire information about, or to contact one another, are not prevented from doing so by oppressive and unfair legislation."[94] We shall first consider the statutory provisions currently in place regarding the confidentiality of adoption records in Canada.

The Alberta Child Welfare Act, which came into force on July 1, 1985, provides a "new look" for Alberta adoption law as it relates to the availability of information relating to an adoption proceeding. Section 66(3)(4)(5)(6) provide the basic traditional approach to the process of dealing with adoption records after the adoption order is granted. Subsections (1) and (2) deal with the distribution of the order to the adopting parent, the Children's Guardian, the Director of Vital Statistics, and the Registrar under the Indian Act (if required); subsections (3) to (6) provide as follows:

> 66(3) The clerk of the Court shall seal all documents in the hands of the Court that relate to an adoption and those documents are not available for inspection by any person except on order of the Court or with the consent in writing of the Minister.
>
> (4) The Minister shall seal all documents in his hands that relate to an adoption and those documents are not available for inspection by any person except on order of the Court or with the consent in writing of the Minister.
>
> (5) The Minister shall not disclose the identity of the biological mother or biological father of

an adopted child to any person save in accordance with section 65.

(6) Notwithstanding subsections (3) and (4), the Minister or the clerk of the Court may provide a certified copy of the adoption order in respect of an adopted person to that person if he is 18 years of age or over.[95]

Section 67 goes on to provide for what is usually termed "non-identifying" disclosure:

67(1) Notwithstanding section 66, the Minister may give information that does not disclose the identity of the adopted child, his biological mother, his biological father, his sibling or his adopting parents to the adopted child, his biological mother, his biological father, his sibling or his adopting parents.

(2) A person referred to in subsection (1) may provide the Minister with information that the Minister may disclose under subsection (1).[96]

Sections 66 and 67 provide (section 67 being a "written down" version

of actual departmental policy over the past several years) a normal "sealed records" statutory provision. However, the 1985 version of the Child Welfare Act provides further for what is commonly called a "voluntary disclosure" or "registry" system, the mechanics of which are set out in section 65. The existence of such a system means that for some adopted children there is a chance that they may be able to trace their own pasts.

Section 65 provides that if an Alberta adoption order (even one made under a previous Act) has been issued, an application may be made to the Minister by the adopted person (if 18 or over), the biological mother or father, or an adult sibling of the adopted person for the disclosure of identity of the adopted person, his biological mother or father or his sibling. Once this application is received, the Minister enters the applicant's name in the record (register) and will cross-check the record to determine if any of the other parties have also applied. Notwithstanding the stipulations regarding "sealed records" in s.66, once two applicants have been "matched" in the register, the Minister "shall disclose" the identity of each to the other. Thus the adopted person may find his biological father or mother or a sibling; the biological father or mother may find the adopted person.[97]

British Columbia is much more restrictive in its treatment of all documents relating to the adoption. In general, no adoption

documents are subject to search and no one except the Attorney General or his designate may have access without a court order. If a court order is applied for, five days' notice must be given to the Attorney General and to the Superintendent of Child Welfare and "good cause" must be shown to the Court for the applicant to obtain (a) a certified copy of the adoption order; or (b) the right to inspect specified or all documents in the file. The same procedure applies to the file housed in the Bureau of Vital Statistics.[98] Needless to say, these sections make the obtaining of information extraordinarily difficult. For example, in Kelly v. Superintendent of Child Welfare[99], Machoff, J., referring to the adopted applicant's fear that some inherited malady might need preventive care, stated: "Anticipatory matters not based on existing facts cannot be deemed 'good cause' because they may never arise."[100]

The Manitoba Child Welfare Act also provides a registry system similar to that of Alberta.[101] The Manitoba legislation contains a supplementary provision regarding the facilitating of personal contact between "matched" registry applicants. The relevant subsection reads as follows:

> 92(2) The director shall establish a registry and maintain the registry as specified in the regulations for the purpose of (...)

> (d) facilitating personal contact subject to subsection 94(3) between natural parents, adoptive parents, and adult adoptees where they have voluntarily registered their wishes to that effect and have received appropriate preparation through counselling when required.[102] (emphasis mine)

Note that in Manitoba the adoptive parents also form part of the registry system.

In New Brunswick there is also a form of registry system in place for the purpose of, in specific cases, revealing information from the normally confidential adoption files. Information will be given out in the following cases: where there is a "matched" request for information, "where it is necessary to avoid a situation in which a person, having obtained identifying information from another source, contacts a natural parent or child without the prior preparation of the person contacted," where information is necessary for preparing a medical or psychosocial history or for the purposes of treatment, or "where the Minister is satisfied that all persons who will be directly affected by the release of information have consented to its release, and that there is no compelling public interest to refuse the request."[103]

Procedure in New Brunswick is slightly different from that used in Alberta or Manitoba. In New Brunswick when the application for information is received, there is first a file search to ascertain the identity of any person referred to in the request, then a confidential contact to that person either to obtain consent to the release of the confidential information (if the consent is not already on file), to obtain the information specified in the request, or to arrange contact.[104]

Newfoundland has an Adopted Children's Register maintained in St. John's at the public registry but it functions totally under "sealed records" rules.[105] Information by search or any kind of disclosure is only possible on the order of a Judge or the Director of Child Welfare.[106]

In Nova Scotia the only information readily available to the adopted child is a certificate of adoption issued by the Minister which may contain only the following particulars: the adopted person's name after adoption, his sex, date of birth and birth registration number, the names of the adoptive parents, the court granting the adoption order and the order's date.[107] Records may only be opened on an order of the Minister or of a county court judge. Section 27(6) also provides a penalty of a $1000 fine and/or one year in jail for any person revealing adoption information contrary to the provisions of the Act.

It is interesting to note in passing that in 1975 Nova Scotia became the first Canadian jurisdiction to amend its Vital Statistics Act to allow an adoptee who had reached the age of majority the right to access to his original birth certificate. The statute was repealed fairly soon afterward, but in the interim one of the first adoptees to apply traced his natural mother who had married and had never revealed the adoptee's birth to her husband or other children. According to the Manitoba Law Reform Commission report, her son's unexpected and unannounced re-entry into her life shattered her family life and caused her great trauma.[108]

Prior to 1978, Ontario's legislation regarding adoption records was much like Alberta's prior to the 1984 passage of the new Child Welfare Act, that is to say, it was based on a "sealed records" approach with access to information available only on court order. But in 1978 the Act was amended by the addition of section 81, which requires that the Ministry of Community and Social Services maintain a voluntary disclosure registry. Any adult adoptee and any birth parent may require the Director appointed under section 81(1) to enter his or her name in the registry. By section 81(5), when the Director enters a name in the registry he must determine whether or not the matching birth parent or adoptee is also listed. If there is a match, the Director must obtain the adoptive parents' consent and a confirmation from the adoptee and the birth parent that they still agree to disclosure of their identities. Having done so, the

Director "shall forward" the information to the appropriate Children's Aid Society, which will disclose it to the parties and provide guidance and counselling.[109] It was this particular version of the voluntary registration registry system and the residual "sealed records" legislation which was considered in Re Ferguson and Director of Child Welfare[110] (which we shall discuss later and which remains at this writing the only Canadian decision in this area at the Court of Appeal level.) It should also be noted that as of this writing a new Ontario Child Welfare Act has come into force on October 1, 1985, which contains two rather severe limitations of the availability of information to those involved in the adoption triangle. The new s.157 binds children's aid societies to maintain strict confidentiality on all background information, including even so-called "non-identifying" facts. The new s.158 allows the adoptive parents to veto joint applications by natural parents and adopted adults who want to meet.[111]

Prince Edward Island, like Newfoundland and British Columbia, has a "sealed records" approach with information available only by court order.[112]

In Quebec the relevant articles of the Code Civil du Québec relating to the confidentiality of adoption records read as follows:

631. Les dossiers judiciaires et administratifs

ayant trait à l'adoption d'un enfant sont confidentiels et aucun des renseignements qu'ils contiennent ne peut être révélé, si ce n'est pour se conformer à la loi.

Toutefois le tribunal peut permettre la consultation d'un dossier d'adoption à des fins d'étude, d'enseignement, de recherche ou d'enquête publique, pourvu que soit respecté l'anonymat de l'enfant, des parents et de l'adoptant.

632. L'adopté majeur a le droit d'obtenir les renseignements lui permettant de retrouver ses parents, si ces derniers y ont préalablement consenti.

Il en va de même des parents d'un enfant adopté, si ce dernier, devenu majeur, y a préalablement consenti.

Ces consentements ne doivent faire l'objet d'aucune sollicitation.[113]

Thus although Article 631 shows a strong bias toward protecting confidentiality (limiting consultation to research purposes and

emphasizing the anonymity of the three sides of the adoptive triangle), Article 632 seems to indicate a registry system similar to Alberta's (unlike Ontario's in that the adoptive parents' consent to disclosure is not required). Like the Ontario system presently in place, any Quebec scheme based on Article 632 would be a passive one (as opposed to an active system as seen in New Brunswick), that is to say, the registry officials do not seek out the second party as at the request of the first; they only give effect to the common, independently manifested wish of both parties ("Ces consentements ne doivent faire l'objet d'aucune sollicitation.")[114]

In Saskatchewan "no search of any file in the office of a local registrar containing an order of adoption or material relating thereto shall be permitted unless under an order made, after reasonable notice to the minister, by a judge." None of the files relating to the adoption filed in the Department of Social Services can be searched without the written permission of the minister.[115]

In the Northwest Territories, except for a copy of the adoption order, which may be supplied by the Superintendent to the adopted child or his adoptive parents, no information is disclosed save by the Superintendent or upon his written direction or by Court order.[116]

In the Yukon, the general rule is that adoption records in possession

of the court remain sealed unless there is a court order to open them.[117] The Director's adoption file is governed by s.98(5), (6), and (7) which provide that the following information may be disclosed when requested by an adult adoptee or either of the adoptive parents: name after adoption, date of birth and birth registration number, names of the adoptive parents, court granting the order and the date the order was granted, and "all information which does not tend to disclose the identity of the parent by birth or other kindred."[118] The Director further has a wide discretion under subsection (7):

> 98(7) Upon the application of any person and subject to any regulations that may be prescribed, the Director may disclose to the applicant any particulars of the adoption that he has in his possession, including information identifying the parents by birth or other kindred.[119]

However, a great discretion is also vested in the Commissioner to make regulations in respect of the disclosure of such information by the Director:

> (8) In respect of applications under subsections (4), (5), and (7), the Commissioner in Executive Council may make regulations in relation to:

(a) the procedure for making applications and the information to be supplied in support of the application,

(b) the procedure for making the disclosure,

(c) the protection of the anonymity of persons who are not the natural or adoptive parents, children, siblings, or other kindred of the applicant,

(d) the protection of the anonymity of any person who requests that his anonymity be preserved, and

(e) reasons why an application under subsection (4) or (7) may be refused.[120]

Any other form of disclosure of information relating to an adoption is an offence.

As we have seen, the question of "sealed records" in Canada is very

real. With most provinces the general rule remains that the system is a closed one with exceptions made for restricted "voluntary" disclosure in Ontario, Alberta, Manitoba, and Quebec and otherwise only court-ordered access or access on ministerial discretion (British Columbia, Prince Edward Island, Newfoundland, the Northwest Territories). Where non-identifying information is given out (Manitoba, Alberta, Ontario prior to Re Ferguson), there are still different guidelines (usually unwritten departmental "policy rules") regarding how and when the information is released and to whom.

There are few reported cases in Canada relating to access to sealed adoption records. In addition to the Kelly case in British Columbia, where the court refused access for lack of "compelling reasons," there is the Manitoba case of L.J.M. v. Director of Child Welfare (Manitoba)[121], where Philp, C.J.C.C. read a "good cause" requirement into the Manitoba Child Welfare Act provision on records access and held that the court could not make an order disclosing records without giving notice to the other members of the adoption triangle. His criterion for granting access was "compelling circumstances," and the "psychological need to know" of the biological mother in the case did not meet the requirement. However, it was implicit in the judgment that the same "need" on the part of the adopted person himself might be sufficient to allow access.

In another Manitoba case, Re Adoption of B.A.[122], the adopted

applicant was suffering from what was called an "identity crisis" (which is arguably the equivalent of the "psychological need to know" in the L.J.M. case). However, even though in this case it was the adopted person himself applying and not a biological parent, access to the adoption files was denied. Per Thompson, Co. Ct. J.:

> The applicant, an adult adoptee, has indeed an understandable interest, but consideration must be given to the strong element of privacy with which an adoption proceeding has been safeguarded and which the statute protects, and to the natural parent and his other expectation that the surrender of the child for adoption would be treated confidentially and shielded from public disclosure. Only for strong and compelling reasons which, as I find are not present in this application, would such an order be made.[123]

The final Canadian case regarding access to sealed adoption files is the Ontario Court of Appeal case of Re Ferguson and Director of Child Welfare[124]. Suzanne Ferguson was born in London, Ontario, in 1928. Her mother, who was unmarried, placed her for adoption shortly after birth. Her adoptive parents were told very little about her natural parents, and she herself was not told of her adoption until she was 17. As she moved through adulthood and the experiences of marriage

and motherhood she also experienced what she called "a sense of incompleteness, as if missing a piece of my identity."[125] As a nurse, Mrs. Ferguson worried over the fact that she had only a very incomplete medical history. Hence she undertook to see what she could learn through the Ontario Ministry of Community and Social Services about her adoption and about her natural parents. When this proved to be far from satisfactory, she applied to the court under s.80(1) of the Ontario Child Welfare Act for an order allowing her access to her file.

In a lengthy judgment, Killeen, Co. Ct. J. dismissed Mrs. Ferguson's application, holding that although the "unwritten policy" of the Ministry had apparently been to give as much non-identifying information as possible to an adult adoptee in Mrs. Ferguson's position, these guidelines had no jurisdiction under s.80 of the Ontario act. Indeed, such guidelines could only lead to the uncertain, unpredictable, and inequitable administration of a public statute. Killeen, Co. Ct. J. further found that the use of the "best interests" test in an application to compel disclosure of information from a sealed adoption file not to be appropriate:

> To me, the "best interests" test dominates those procedures outlined in the Act for the adoption of children but there is clear evidence in ss. 80 and 81 of the Act which indicates that the "best

interests" test has no place in a disclosure decision: after the adoption order has been signed, the shield of secrecy erected around the adoption process demands that equal prominence be given to the interests of each of the parties to the adoption triangle. Up to this point in history in Ontario, after all, the natural and adoptive parents have all been told by the children's aid officials that their respective future lives would be freed from pre-adoption relationships relating to the adoptive child. While the adoptee was not a meaningful player in adoption proceedings which led to his statutory rebirth in a new family, it must be admitted that the adoption was undoubtedly in his interests; and several years later, I see no strong reason why his alleged "right to know" should loom larger than the pre-set conditions of confidentiality guaranteed to the old and new parents during the adoption process. My conclusion is, therefore, that the "best interests" standard is neither mandated nor implicated by logical reasoning as the decisive factor in a s-s. 80(1) ruling.[126]

He criticizes the legislative provisions establishing the Ontario registry in three areas, stating (a) that s.81 fails to differentiate between identifying and non-identifying data; (b) that it further fails "to give an active thrust to the registry itself by mandating the communication of full information about the registry to prospective members of the adoption triangle and the public; and (c) that s.80 does not clarify the process of disclosure to be followed by the Director or the judiciary.[127]

The Ontario Court of Appeal upheld Killeen's ruling and adopted the reasoning of Mackoff, J. from the Kelly case in stating that for Mrs. Ferguson to succeed she must show "a cause of such gravity and importance to displace the statutory rights of the other parties as well as the interest of the province in maintaining the integrity of the adoption system."[128] Counsel for Mrs. Ferguson had raised Constitutional arguments under ss.7 and 12 of the Charter (freedom of thought, expression, association; freedom from cruel or unusual treatment), but these were summarily rejected by the Court. In a pointed remark about the appropriateness of the "real basis" of Mrs. Ferguson's counsel's argument, that is to say, his "attack on the wisdom of the secrecy provisions in that part of the Child Welfare Act dealing with adoption," the Ontario Court of Appeal sent a clear message to the Ontario Legislature which, as previously noted, has apparently resulted in the drafting of ss.157 and 158 of the new Ontario Act.

Obviously the controversy over sealed records is one which will intensify over the next few years. Parent Finders' Association of Alberta is already on record as saying that the new Alberta legislation, for example, does not go far enough in allowing an adult adoptee access to his records. In Alberta 6400 names were already on the registry waiting list (a list which was begun in 1978 in anticipation of amendments to the Act) when the new Act came into force, and the general feeling of Parent Finders members seems to be that files should be open to all adoptees when they reach the age of majority. Social Services Minister Neil Webber, however, has stated that when the new Act was drafted, the majority of opinion was against open files since "we felt we had a responsibility to the birth mother."[129]

Clearly there are interests to be balanced in the area of records, and just how that balance will finally be struck is an open question at this time. With the coming into force in April of 1985 of Section 15 of the Charter ("Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination....")[130], it is arguable that future Canadian litigation will follow the pattern already established in the United States where the adoptees who wish access to their adoption records argue on a constitutional basis that because of their adopted status, the sealed records laws deny them the right

which all other Americans have to know what their natural origins are and thus are in violation of the fourteenth amendment to the United States Constitution, the so-called "equal protection" amendment.[131] It would appear that this argument could now be advanced on behalf of Canadian adoptees.

In summary, we have seen in this chapter that an adoption order has rather far-reaching legal effects on the members of the adoption triangle. The adopted child has altered inheritance and property rights, potential problems relating to his capacity to marry in certain situations, and a difficult, if not insurmountable, task when it comes to obtaining any access to information relating to his life prior to the granting of the adoption order. The natural parent, especially a divorced parent, is also affected by the adoption order in that he stands to be stripped of any access right he may have formerly had to his child. And the adoptive parents, too, may be affected in a slightly different manner by the adoption order since in some Canadian jurisdictions they may find themselves yoked to the natural parent by the subsistence of an access order in the natural parent's favour. Although statutory death and rebirth is the legal fiction with which we work in adoption, "real life" often seems all too ready to complicate the process.

What then is the "real life" state of the Canadian adoption process today? We shall examine its current state and attempt to outline

in our concluding chapter some areas where future reform may be necessary.

NOTES

[1] Margaret E. Hughes, "Adoption in Canada," in Derek Mendes Da Costa, ed., Studies in Canadian Family Law (Toronto: Butterworths, 1972), vol. I, p. 167.

[2] For a discussion of the legal effects of adoption in Canada 30 years ago, see Gilbert D. Kennedy, "The Legal Effects of Adoption," 33 Canadian Bar Review (1955) 751.

[3] Hughes, op. cit., p. 168.

[4] Alberta Child Welfare Act, S.A. 1984, c. C-81., s. 64(1).

[5] British Columbia Adoption Act, R.S.B.C. 1979, c. 4, s. 11.

[6] Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 96(1)(3).

[7] Ibid., s. 96(2).

[8] New Brunswick Family Relations Act, s. 85(1).

[9] Ibid., s. 85(2).

[10] Newfoundland Adoption of Children, 1972 Act, s. 14(1).

[11] Ibid., s. 14(2)(3).

[12] Ibid., s. 21.

[13] Nova Scotia Children's Services Act, s. 22; Ontario Child Welfare Act, s. 85; Prince Edward Island Adoption Act, s. 19.

[14] Code Civil du Québec 1980, Arts. 626-630.

[15] Saskatchewan Family Services Act, s. 60(1)(2).

[16] Ibid., s. 60(3).

[17] Ibid., s. 61(1).

[18] Ibid., s. 61(2).

[19] Yukon Territory Children's Act, s. 100.

[20] Hughes, op. cit., p. 175.

[21] Kennedy, op. cit., supra, note 2, p. 835.

[22] See Ontario Law Reform Commission, Report on the Status of Adopted Children to the Minister of Justice and Attorney-General for Ontario (1969), p. 5.

[23] Re Clement, Gardner v. Gardner, [1962] S.C.R. 235, 31 D.L.R. (2d) 657, affirming [1960] O.R. 648, 25 D.L.R. (2d) 558.

[24] Re Gage, Ketterer et al. v. Griffith et al., [1962] 31 D.L.R. (2d) 663.

[25] Ibid., p. 666.

[26] Ibid., p. 667.

[27] See, for example, Re Donald, Baldwin v. Mooney, [1929] 2 D.L.R. 244; Re Stuart (1957), 10 D.L.R. (2d) 634; Re Words (1982), 133 D.L.R. (3d) 751.

[28] Re Purpur, [1984] 9 D.L.R. (4th) 387 (Man. Q.B.).

[29] Re Podolsky and Podolsky et al. (1980), 111 D.L.R. (3d) 159, 3 Man. R. (2d) 251 (sub nom. Re Podolsky Estate) 7 E.T.R. 62 (Man. C.A.).

[30] The Devolution of Estates Act, R.S.M. 1970, c. D 70, ss. 6(4), 5(b), and 8(1).

[31] Cameron Harvey, "Intestate Succession Rights of Adopted Children in Manitoba: The Podolsky Case," 11 Manitoba Law Journal (1981), pp. 201-202.

[32] S. 96(2) of the "old" Child Welfare Act stated: "An adopted child does not by reason of the adoption lose the right to inherit from his natural parent or kindred."

[33] S.M. 1979, c. 22, s. 62.

[34] Similar fact situations (but different legislative provisions) are to be found in Re Jobson (1912), 129 P. 938 (Calif. S.C.) and in Re Jensen (1964), 47 D.L.R. (2d) 630 (B.C.S.C.).

[35] Re Podolsky Estate (1980), 3 Man. R. 251 (Man. C.A.).

[36] See further the case comment of Anne Bolton, "Podolsky v. Podolsky," 11 Manitoba Law Journal (1981), pp. 205-206.

37 Harvey, op. cit., pp. 204-205.

38 Ibid., p. 205.

39 Bolton, op. cit., p. 207.

40 Hillier and Hillier v. Williams (1979), 14 R.F.L. (2d) 31 (Man. C.A.).

41 Ibid., p. 40.

42 Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 96.

43 Re Broddy and Director of Vital Statistics, [1983] 1 W.W.R. 481, 142 D.L.R. (3d) 151 (Alta. C.A.), reversing 130 D.L.R. (3d) 758 (Alta. Q.B.).

44 Re Broddy and Director of Vital Statistics, 1982, 130 D.L.R. (3d) 758 (Alta. Q.B., p. 761.

45 Re Broddy and Director of Vital Statistics, [1983] 1 W.W.R. 481 (Alta. C.A.).

46 Ibid., p. 490.

47 Ibid., p. 491.

48 H. Albert Hubbard, "Marriage Prohibitions, Adoption and Private Acts of Parliament: The Need for Reform," 28(2) McGill Law Journal (1983), p. 197, note 68.

49 Ibid. Hubbard suggests that this is doubtful, given the Supreme Court of Canada decision in Natural Parents v. Superintendent of Child Welfare [1976] 2 S.C.R. 751, (1975) 60 D.L.R. (3d) 148. "If Mr. Justice Kerans' premises are correct, would they not lead to the following conclusion: although a province could not 'amend' the Indian Act, R.S.C. 1970, c. I-6, by 'deeming' to fall outside its scope a biological Indian adopted by non-Indians, that province could deprive a biological Indian of its Indian status simply by setting out in its adoption legislation an express prohibition against the registration under that Act of an Indian child adopted by non-Indians?" Note that this conclusion is diametrically opposed to the reasoning of the Supreme Court of Canada in Natural Parents.

50 Ibid., p. 203.

51 Ibid.

52 Ibid.

53 Nova Scotia Children's Services Act, Consolidated Statutes of Nova Scotia, c. C-13, s. 28. See also Newfoundland Adoption of Children, 1972 Act.

54 Hubbard, op. cit., p. 207.

55 Ibid.

56 Ibid., p. 208.

57 Ibid., p. 218.

58 Ibid., p. 219.

59 Ibid., p. 215.

60 Hughes, op. cit., p. 172.

61 Crossley v. Crossley, [1953] P. 97.

62 See, for example, North v. North, [1978] 6 W.W.R. 75 (B.C.S.C.) or Re S. (1979), 6 R.F.L. (2d) 48.

63 See, for example, W. v. H., [1982] 1 W.W.R. 397 (Man. C.A.); G.M.Z. v. T.F.S.B. (1980), 18 R.F.L. (2d) 47 (C.A.); A.F. v. B.F. (1981), 22 R.F.L. (2d) 12 (Co. Ct.).

64 Re Children's Aid Society of Metropolitan Toronto and C.B. (1977), 1 Fam. L. Rev. 152.

65 Ibid., pp. 152-153.

66 North v. North, supra, note 62.

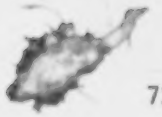
67 Ibid., p. 78.

68 Ibid., pp. 78-79.

69 Kerr v. McWhannel and McWhannel, [1974] 6 W.W.R. 543 (B.C.C.A.).

70 Ibid., p. 545.

71 Re Female Child, British Columbia Birth Registration No. 74-09-131763, Re Adoption Act, [1980] 2 W.W.R. 577 (B.C.S.C.).



72 Ibid., p. 579.

73 Ibid., p. 580.

74 Bosworth v. Cochran and Cochran, [1984] 2 W.W.R. 86 (B.C.-S.C.).

75 Ibid., p. 95.

76 W. v. H. and Attorney General of Alberta, [1982] 1 W.W.R. 397, 17 Alta. L.R. (2d) 139, 25 R.F.L. (2d) 337, 130 D.L.R. (3d) 492 (sub nom. Williams v. Hillier), 33 A.R. 613 (Alta. C.A.).

77 Ibid., Williams v. Hillier, [1979] 4 W.W.R. 319.

78 W. v. H. and Attorney General of Alberta, [1982] 1 W.W.R. 397, p. 409.

79 Re Z and B, 115 D.L.R. (3d) 706 (Man. C.A.).

80 See Re Adoption No. H. 5877 (1975), 21 R.F.L. 306 (Man. C.A.) where the application for adoption was dismissed because it would have terminated a right of access. Per Freedman, C.J.M., "It would accordingly not be open to a judge on such a decree [i.e., of adoption] to add a condition providing for access or visiting rights on the part of a natural parent." (p. 307).

81 Re Pshebnicki Adoption (1967), 66 D.L.R. (2d) 82, 62 W.W.R. 256 (sub nom Pshebnicki v. Yurchuk) (Man. C.A.).

82 Re Goldstein and Brownstone et al. (1970), 15 D.L.R. (3d) 102, 3 R.F.L. 4, 75 W.W.R. 193 (Man. C.A.).

83 R. v. County Court Judge, Ex. p. Sobering (1969), 8 D.L.R. (3d) 575, 71 W.W.R. 283 (sub nom Sergeant v. Sobering et al.) (Man. Q.B.).

84 Ibid., p. 119.

85 Smith v. Koch, [1976] 3 W.W.R. 346, 24 R.F.L. 155, 67 D.L.R. (3d) 303 (Alta. S.C.).

86 The same mechanism exists under Saskatchewan legislation whereby notwithstanding the adoption divesting sections in the Family Services Act, the Infants Act (s. 3(1)) allows an application for access to be brought by "a parent or other person having, in the opinion of the court, a sufficient interest." The natural father

still qualifies as "a parent" and in any case has a "sufficient interest" to apply. See Re Spence and McKenna (1981), 127 D.L.R. (3d) 761 (Sask. Q.B.). See also S. v. Minister of Social Services, [1982] 3 W.W.R. 358.

87 Re W. and J. et al. (1981), 130 D.L.R. (3d) 418, 34 O.R. (2d) 44, 24 R.F.L. (2d) 342 (Ont. C.A.).

88 Re Metropolitan Toronto Children's Aid Society and C.B., supra, note 64.

89 Re. W. and J. et al., supra, note 87.

90 Metro Toronto Children's Aid Society and C.B., supra, note 64, pp. 152-153.

91 Timothy T. Daley, "Adoption and Access: Recent Developments," 23 Reports of Family Law (1976) p. 264.

92 See, for example, June Callwood, "Adopted People May Never Know," (Toronto Globe and Mail, 3 May 1985); Florence Fisher, The Search for Anna Fisher (New York: Fawcett Books, 1973); Elizabeth Lemoine, "I Have Two Mothers," (Good Housekeeping, September 1980); Margaret Budgen, "The Right to Rediscover Roots," (Maclean's, 4 August 1980); Wendie Redmond and Sherry Sleighthorn, Once Removed: Voices from Inside the Adoption Triangle (Toronto: McGraw-Hill Ryerson, 1982); and many more.

93 See, for example, Arthur D. Sorosky et al., The Adoption Triangle: the Effects of the Sealed Record on Adoptees, Birth Parents, and Adoptive Parents (New York; Doubleday, 1978); John Triseliotis, In Search of Origins: The Experiences of Adopted People (London: Routledge and Kegan Paul, 1973); Mary Ann Jones, The Sealed Adoption Record Controversy (New York: Child Welfare League of America, 1976).

94 Manitoba Law Record Commission, Report on Confidentiality of Adoption Records (1979), Report #30, p. 4.

95 Alberta Child Welfare Act, S.A. 1984, c. C-8.1, s. 66(3) (4) (5).

96 Ibid., s. 67.

97 Ibid., s. 65.

98 British Columbia Adoption Act, R.S.B.C. 1979, c. 4, s. 15.

99 Kelly v. Superintendent of Child Welfare (1980), 23 B.C.L.R. 299 (B.C.S.C.).

100 Ibid., p. 303.

101 Manitoba Child Welfare Act, S.M. 1974, c. 30, s. 92.

102 Ibid., s. 92(2)(b).

103 New Brunswick Family Services Act, s. 92(2)(f)-(i).

104 Ibid., s. 92(3).

105 Newfoundland Adoption of Children, 1972 Act, s. 20.

106 Ibid., ss. 20(4) and (6).

107 Nova Scotia Children's Services Act, s. 27(4).

108 Manitoba Law Reform Commission, supra, note 94, p. 7.

109 Ontario Child Welfare Act, s. 81.

110 Re Ferguson and Director of Child Welfare (1983), 3 D.L.R. (4th) 178 (Ont. C.A.), affirming (1983) 142 D.L.R. (3d) 609 (Ont. Co. Ct.).

111 June Callwood, "Adopted People May Never Know," (Toronto Globe and Mail, 3 May 1985, p. 13). Note that this was information obtained prior to the Ontario election in which the Ontario Conservative party lost its majority in the Ontario legislature. Bill 77 (the new Ontario Child Welfare Act) had been passed in December, 1984, and was scheduled to go into force on July 1, 1985. However, that date was moved back to October 1, 1985. The proposed sections caused a huge public outcry in Ontario both from within the Ministry itself (where the registry system and the informal giving out of "non-identifying" information procedure had apparently been working well) and from the general public (at last count some 45,000 Ontarians were "registered.") On the CBC Evening News (the National) of April 20, 1985, Conservative Frank Drea of Ontario (the then Minister of Community and Social Services) responded angrily to suggestions by a CBC reporter that the "sealed records" policy had been put back into the Ontario Act at least partly because the Minister's own 18-year-old adopted daughter had recently become a member of a parent finders' group and was actively seeking her natural parents that "It's no one's damn business to find out private and confidential information about adopted children! The Cabinet has accepted this, and it's going to be the law!" At first glance it may

seem hard to grasp these violent (and extraordinarily subjective) comments coming from a Minister of the Crown, but perhaps they merely serve to show the volatile and deep emotional responses the process of adoption can still inspire.

112 Prince Edward Island Adoption Act, ss. 21, 22, 23.

113 Code Civil du Québec 1980, Arts. 631, 632.

114 Quebec has quite a few active parent finders' groups (the most influential is probably Le Mouvement Retrouvailles) who have successfully lobbied Quebec Social Affairs Minister Guy Chevrette to appoint a four-member committee to clarify the rights of the adopted child to know his natural origins. Members from the Quebec departments of Justice, Social Affairs, and the Status of Women will have to consider the effect of Art. 632 on the confidentiality of adoption records. (Canadian Press release, Toronto Globe and Mail, 15 July 1985).

115 Saskatchewan Family Services Act, ss. 68, 69.

116 Northwest Territories Child Welfare Ordinance, s. 95.

117 Yukon Territories Children's Act, s. 98(3).

118 Ibid., s. 98(5)(6).

119 Ibid., s. 98(7).

120 Ibid., s. 98(8).

121 L.J.M. v. Director of Child Welfare (Manitoba) (Winnipeg Co. Ct.), unreported, referred to by Manitoba Law Reform Commission, supra, note 94, p. 5.

122 Re Adoption of B.A. (1980), 17 R.F.L. (2d) 140 (Man. Co. Ct.)

123 Ibid., p. 143.

124 Re Ferguson and Director of Child Welfare, supra, note 110.

125 Re Ferguson and Director of Child Welfare, 142 D.L.R. (3d) 609, p. 611.

126 Ibid., pp. 634-635.

127 Ibid., p. 637.

128 Re Ferguson and Director of Child Welfare (1983), 3 D.L.R. (4th) 178, p. 180.

129 Maxine Ruvinsky, "More Wanted from Post-Adoption Registry," (Edmonton Journal, 22 July 1985), p. B-12.

130 Canadian Charter of Rights and Freedoms, Part I of Schedule B, Canada Act 1982, 1982 c. 11, (U.K.).

131 See, for a complete overview of this line of reasoning, Carolyn Burke, "The Adult Adoptee's Constitutional Right to Know His Origins," 48 Southern California Law Review (1975), pp. 1196-1220; Kathryn J. Giddings, "The Current Status of the Right of Adult Adoptees to Know the Identity of Their Natural Parents," 58 Washington University Law Quarterly (Summer 1980), pp. 677-703; or Carol Gloor, "Breaking the Seal: Constitutional and Statutory Approaches to Adult Adoptees' Right to Identity," 75 Northwestern University Law Review (April 1980), pp. 316-344.

CHAPTER IV

CANADIAN ADOPTION TODAY: ISSUES, TRENDS, PROBLEMS

Never before has the adoption service faced such formidable challenge and pressure to change its institutionalized assumptions and conventional beliefs as it has in recent years. The impetus for change in the traditional structure of adoptive kinship came from a unique convergence of conditions and circumstances such as demographic changes in adoptable infants and adoptive applicants, human rights and freedom of information legislation, recognition of adoptees' rights, emergence of minority groups, the women's movement, advances in biotechnology, etc. Once guarded by secrecy and anonymity and maintained by the adoption triads through their illusionary belief of its equivalence to consanguineal relationships, the adoptive family is now exposed to public and professional scrutiny. Interestingly, the change process was initiated mostly by members of the adoption triangle rather than professionals. Adoption agencies are faced with a serious dilemma resulting from contradictions

> and ambiguities inherent in the adoptive arrangements. The more serious challenge has come with the recognition among adoption workers for significant shift in value orientation and adoption policy and for the need to mediate and balance the conflicting rights and interests of the principals.
>
> ---Paul Sachdev
>
> Adoption: Current Issues and Trends

In this the concluding chapter to our study of Canadian adoption law, we should like first to examine two areas which are unique to Canadian law--customary adoption among the Eskimos and adoption as it affects Indian children--and then to outline the current contentious issues in our law and suggest some possible solutions. We shall consider the areas of private adoption, step-parent adoption and post-adoption access, the role of the putative father, adoption subsidies, and the potential effect of s.15 of the Charter on future adoption litigation.

Canadian Customary Adoption

We have gone to considerable length to set out the statutory requirements leading to an adoption order in the various Canadian jurisdictions. However, Canada's provincial and territorial

legislation concerning adoption does not in reality provide the full story when it comes to the adoption process. In addition to the statutory process of adoption, customary adoption is also in existence today in Canada. The process derives from the traditional custom of the Inuit people to deliver a child or children from one set of parents to another "in adoption"--without any necessary compliance with formalized written regulations. Acceptance of customary adoption as "legal adoption" in Canada owes much to two judges who spent a great deal of their time on the bench serving in the Northwest Territories, Justice J.H. Sissons and Justice W.G. Morrow.[1]

The most famous case concerning customary adoption was decided 25 years ago by Mr. Justice Sissons. In 1961 when Re Katie's Adoption Petition[2] was brought before the court, statutory provisions contained in the Northwest Territories Adoption Ordinance[3] were comparable to the provisions of the Child Welfare Ordinance still in existence in 1985, that is to say, those persons who had the capacity to adopt were restrictively designated, there were "paper" requirements of a medical certificate and a marriage certificate, and "a great many regulations quite unworkable in the high Arctic."[4] One such regulation, for example, made it an offence to place a child for adoption without notification to the Superintendent for Child Welfare within 30 days of placement. According to Sissons, J., "This is generally an impractical provision so far as Eskimos are concerned.

At most points there is no regular mail service and mail goes in or comes out by chance, perhaps once or twice a year. The ordinary Eskimo cannot read or write. The superintendent is far away. There is usually no one locally in authority, or perhaps within 500 miles, who could be notified, even if such notification would be sufficient. It is a shocking provision which makes it a crime for an Eskimo to follow his ancient custom in the traditional way."[5]

Finding basically that statutory adoption provisions were unrealistic having regard to conditions in the Northwest Territories, Sissons, J. allowed Katie to be adopted "by custom" and held that adoptions "made according to the laws of the Territories" included adoptions in accordance with Indian or Eskimo custom and could thus be in a sense ratified by the Court through the issuance of a declaratory order. Per Sissons, J.:

> The Eskimos, and particularly those in outlying settlements and distant camps, are clinging to their culture and way of life which they have found to be good. These people are in process of cultural change and have a right to retain whatever they like of their culture until they are prepared of their own free will to accept a new culture. In particular, although there may be some strange features in Eskimo adoption

> custom which the experts cannot understand or appreciate, it is good and has stood the test of many centuries and these people should not be forced to abandon it and it should be recognized by the court.[6]

According to Justice Morrow, the backlog of adoptions (customary adoptions awaiting declaratory judgments) had reached such proportions following Re Katie that the Commissioner approved Justice Sissons' plan to hold special hearings throughout the Arctic and issue the declaratory judgments on circuit. This resulted in some 200 custom adoption orders granted by the Court in the early sixties, and when Justice Morrow succeeded Justice Sissons in 1966, the next decade saw a further 400 custom adoptions granted. Today custom adoptions are processed by a legal officer with the Territorial government who attends on the judge at Yellowknife as the need arises.

Morrow cites survival as the main reason behind the existence of custom adoption. He gives the example of a mother of twins who gave one away because she could only manage to care for one child at a time or the mother who gave up her child by custom adoption explaining that all her other children had died and she wanted this one to live.[7]

However, despi[redacted]ngoing presence of custom adoption among the Inuit, we do see signs of contamination from the contact of custom law with "southern" law. In 1972 the case of Re Deborah E4-789, Tucktoo v. Kitchoovalik and Enooyhak[8] marked a "first," a case of an attempted revocation of "consent" to custom adoption by the natural parents.

In 1968 an Eskimo couple, Rebecca Enooyak and Gideon Kitchoovalik, already had four children when the mother became ill and was obliged to travel to Edmonton for treatment (she was hospitalized there for almost three years). The family's one-year-old daughter Deborah was given "in adoption" to the Tucktoo family in order to allow Gideon Kitchoovalik to carry on his work as hunter and trapper and provide for his other three children. However, in 1972 when the mother returned home, the natural parents attempted to take the child back. Expert evidence at trial, however, demonstrated that a "revocation" of the adoption does not form part of the custom, that is, the placement could not be undone or the child repossessed once the child had been given. In Re Deborah, despite the argument that the mother's continuing "consent" was a necessary component of the adoption, the judgment upheld Re Katie, acknowledging that the requirements of a custom adoption are different from a regular adoption according to the Child Welfare Ordinance. The decision in Re Deborah was upheld on appeal.[9]

The practice of granting declaratory judgments for custom adoptions was extended to include Indians by the 1969 decision of Re Indian Custom Adoptions, Re Beaulieu's Petition.[10] Expert evidence in Beaulieu disclosed that "as far back as could be remembered the system of adoption by custom among [the Dogrib Indians] had been practised and was respected in much the same way as with the Eskimos."[11] Section 48(16) of the Indian Act (Canada) also recognized the possibility of custom adoption ("In this section 'child' includes a legally adopted child and a child adopted in accordance with Indian custom".)

The only other reported Canadian case dealing with a customary adoption is Re Wah-Shee.[12] In this case there had been a marriage between a treaty Indian and a white woman. Since the woman had expressed a desire to become an integral part of the Indian community, she had gone through the Indian form of marriage; but when she and her husband applied to the Court for a declaratory "custom adoption" order, the question arose as to whether such an order could be granted where one of the applicants was not a full Indian. In Wah-Shee, however, the judgment allowed the custom adoption and found that the adoptive mother was, by virtue of her acceptance by the band, a full Indian with all the rights such status includes.[13]

In a custom adoption the Court does not consent or refuse the adoption order, as it would for an application brought normally under

the relevant Child Welfare legislation; in a custom adoption the hearing is simply held to establish the fact that such an adoption has indeed occurred. The declaratory order certifies what has already in fact transpired, and it becomes a useful (and necessary) document for estate purposes as well as serving to regulate birth certificates and family allowance payments. Justice Morrow poses the obvious question when he wonders how long Eskimo and Indian adoptions will be able to remain "a serious aspect of the cultural survival of the northern native."[14] His conclusion--that the custom will survive for many generations to come "so long as the southern-oriented legislation leaves the situation alone"[15]--is one shared by other social scientists who have studied the interrelationships between custom and statute law in Canada. It is interesting to note, however, that it is perhaps in the area of custom adoption (which has virtually no bureaucratic red tape) where the "best interests" test seems in reality--and not just in theory--the basic test which governs.

Adoption and Canadian Indians

Adoption as it relates to Indians in Canada can either be customary as discussed above, or can come under the statutory provisions of the various provincial jurisdictions. One of the earlier questions which arose concerning the adoption of Indians had to do with the constitutional question of the effect of the federal Indian Act on

provincial adoption legislation. However, given the Supreme Court of Canada decision in Natural Parents v. Superintendent of Child Welfare and Petitioners for Adoption[17] and the Manitoba Court of Appeal decision in Nelson v. Children's Aid Society of Eastern Manitoba[18], it would appear that that particular question has been settled.[19] The other, more permanent and more disturbing, problem related to Indians and the adoption process is the consistent overrepresentation of native children in the child welfare system, one outcome of which has been that many more children of native ancestry become available for adoption than can be readily placed by the agencies that receive them into care. Thus the adoptable native child has become a "hard-to-place" child almost by definition.[20] This factor in turn has led to other dilemmas concerning the fate of the native child caught up in the Canadian child welfare system. Indian children are not only overrepresented among those children legally available for adoption; they are also more likely to be older (less likely to be adopted as infants, more likely to come into care at an older age) and more likely to suffer from physical or mental disability.[21]

Ryant tells us that fully 76% of native children who were adopted in Canada ten years ago were placed with white families,[22] a statistic which runs counter to the current trend in the United States where transracial adoptions have generally been on the decline because of the politicization of race relations there. Although Canadian native peoples have become increasingly critical of the practice of placing

Indian children in white families (because of the child's resultant loss of his cultural heritage, the risk of permanent marginality for the child, "cultural genocide," etc.), the most typical response in Canada has still been to place the native child in a white family, sometimes even with a white family in the United States (which would seem to compound the problem).

Should adoptable Indian children remain within the native community? Ought adoption of native children by white families, by white American families be discouraged or prohibited?

Ryant suggests that perhaps a useful analogy could be drawn here between the question of race and the "old" problem of religion as it relates to adoption practice. Since the prevalent view in both law and child welfare practice today is to respect the natural mother's request that the child be raised in her faith and to cross religious boundaries only when the mother has made no stipulation as to religion, perhaps the same practice could be utilized in the case of native children who are freed for adoption.[23]

Obviously the risk remains that if the native child is adopted by a white family he may never be fully integrated into either native or white culture; and although he may arguably have a better economic and social status in his adopted home (since in general the socio-economic class of white adopters is superior to that of native

adopters), he may not be "accepted" by the remainder of white society. On the other hand, if the native child remains in foster care (simply because there are not enough native adoptive homes to meet the need), he risks having a terribly impoverished existence emotionally, economically, and socially.

It would seem evident that although transracial and extranational placements seem to be frequently utilized in the Canadian adoption process, there are significant questions raised by such practices and a continuing undercurrent of dissatisfaction among Canada's native peoples who feel, rightly or wrongly, that the adoption process is often used against them as a sort of weapon by the government bureaucracy.[24] Ryant suggests, therefore, that brokerage, subsidized adoption, and the conscious development of a supply of native adoptive homes for native children might possibly provide solutions for the problems of native children in the adoption process.

Currently the National Adoption Desk in Ottawa functions as a kind of clearinghouse where hard-to-place children are listed and supply and demand nationwide can be more easily monitored. (The largest numbers of adoptable native children are from Manitoba, Saskatchewan, and Alberta where their visibility as members of a minority group tend to make them hard-to-place. However, in Ontario and Quebec native children are not so "unacceptable" since agencies there quite often import Asian children who, although also visibly members of a

minority group, are readily placed in adoptive homes.) The Adoption Desk simply links supply and demand in an attempt to allocate oversupply to areas of greater demand.[25]

We shall discuss the question of subsidized adoption later. As for the encouragement among native people to apply to become adoptive parents, this would seem to be an ideal solution and one toward which child welfare officials should be working.

Even if transracial adoption remains the most practical way of placing the native child, it should perhaps also be the policy of the various provincial legislatures to enact provisions similar to those contained in s.73(5) of the new Alberta Child Welfare Act, which require the adopting parent of an Indian child to inform the child of his status as an Indian and to help him in exercising his Indian rights.

> 73(5) If, after this Act comes into force, a person adopts a child who is an Indian, that person shall
>
> > (a) take reasonable measures on behalf of the child necessary for the child to exercise any rights he may have as an Indian, and

(b) as soon as, in the opinion of that person, the child is capable of understanding his status as an Indian, inform the child of that status.

(6) On making an adoption order, a court, if it has reason to believe the adopted child is an Indian, shall inform the adopting parent of the requirements of subsection (5).[26]

Although these provisions do not in any way ensure that a child's Indian cultural heritage will be safeguarded if he is placed for adoption in a white adoptive home, it does charge the new family with a certain responsibility to see that the child has full knowledge of that particular portion of his life "before" adoption.

Step-Parent Adoptions? Some Possible Alternatives

As we have seen above in Chapter II, the problems involved in step-parent adoptions do not seem to have been solved through legislative amendment nor do we have any clear guidelines available from Canadian case law. Given that the preponderance of professional opinion seems to be against the wholesale or automatic granting of such orders unless there are special circumstances, perhaps we can

here suggest some alternatives to statutory death and rebirth which will still manage to serve the needs of the parties involved (the need to bring the child into the new family unit by giving him the same name as other family members, the need to give some form of parental authority to the step-parent, and the need to ensure that the "other" biological parent, the ex-spouse, does not lose a beneficial parental relationship with his child).

If in the new marriage the child feels left out only because his name is different, provincial legislation exists in all jurisdictions whereby the parent and step-parent can apply for a change of name for the child. This usually requires the consent of the non-custodial parent (and obtaining such a consent may involve the same horrendous difficulties normally encountered with obtaining a consent to the adoption itself); however, the consent may be waived by the court. For many children, this symbolic change of name (identity) would probably be just as effective as a total adoption (which, although in many respects a purely symbolic action also, has many more serious legal ramifications than a change of name) to make him feel as if he "belongs" to his new family. However, for the parents concerned, the simple change of name would not bring with it the full effects of an order for adoption and thus would not interfere with the child's existing relationships with the non-custodial parent and members of his family.

If within the new marriage the child feels alienated in some way from his step-parent, he may in turn be reluctant to form any kind of parent-child bond with a person whom he considers to be "the enemy."[27] The step-parent's natural response to this state of affairs may be to proceed immediately to adoption in order to create (albeit in a totally artificial manner) the family bonds which do not apear to be otherwise forthcoming. The step-parent feels a lack of authority and thus looks to the legal process to provide him with some. However, if "official" parental authority is desired, there are perhaps other ways of proceeding.

Oppel points out that in the majority of situations where a step-parent adoption is requested, there is also a decree nisi of divorce somewhere nearby. Generally in the divorce decree one parent was given custody of the child (normally the parent who is now seeking an adoption order with the new spouse) and the other parent was given some form of access. But a close reading of s.11(1)(c) of the Divorce Act[28] shows that there is no express restricting of custody to either the petitioner or respondent. Thus the possibility is there that the Court could, in the proper case, grant custody of the child to some third party. Section 11(2), which provides the basis for applications to vary the terms of the decree nisi having regard to the conduct, change in condition, means or other circumstances of the parties, could conceivably be read so as to allow the custodial parent to bring an application to vary the nisi thereby vesting

custody jointly in herself/himself with the new spouse and leaving the access terms to the other natural parent as per the original order. This seems a quite reasonable approach and one which is currently used in England.[29]

Oppel also cites an alternative proposed by MacKeigan, C.J.N.S. in Wolfe v. Cherrett[30], whereby the step-father, with the Administrator's consent, could apply for a custody order under s.67 of the Nova Scotia Children's Services Act. The same kind of procedure could be utilized in British Columbia under the Family Relations Act since step-parents are expressly defined as "parents" in the Act. Other provincial legislation could also be used to this end (eg., the Alberta Domestic Relations Act). Thus if the step-parent truly feels some pressing need for legal authority vis-à-vis the child, a custody order of some kind (either via the subsisting decree nisi of divorce which originally decided the matter of the child's custody and access or by using provincial custody statutory provisions) would appear to provide a possible alternative to adoption.

Another argument which is often voiced in favor of step-parent adoptions is that of the unfortunate situation which could arise if the child had spent enough time in the step-family to become emotionally attached to the step-parent and then the custodial parent were to die. Presumably if no adoption order relating to the child had ever been granted, the step-parent would have an uphill battle

preventing the surviving natural parent from regaining custody of the child. Clearly this is a consideration when the court is deciding whether or not a step-parent adoption order should be granted, but once again there would appear to be a less drastic alternative to an order for adoption, that being the alternative of some form of guardianship. The guardianship legislation of most provinces provides that parents jointly, or the custodial parent alone, may appoint a guardian for the child in a deed or will. This appointment is not always binding (on the guardian or on the court), but it will arguably be sufficient to give the step-parent some legal standing so as to oppose the surviving natural parent if necessary.

British Columbia's Equal Guardianship of Infants Act, for example, allows either a father or a mother to appoint (by deed or will) a person to act as guardian of an infant child after the parent's death. Where a guardian has been appointed, the surviving parent exercises all his powers jointly with the guardian. The guardian has standing in any custody proceedings regarding the child; and if he accepts his guardianship in writing, he "thereupon possesses the same authority over the infant as he or she would have were the ward his own or her own child, and is bound to perform the duties of a parent toward such ward."[31]

In the British Columbia Commission on Family and Children's Law report, there is express recognition of the emotional ties that

remain after divorce between the child and his other, non-custodial, parent and the value of preserving those ties. Recommendation 32 accordingly provides that "where there is an application to adopt the court should be able to deny the application and substitute instead an order for guardianship if it thinks that it is in the best interests of the child to do so."[32]

Change of name, custody, or guardianship as alternatives to a step-parent adoption, it is submitted, serve to stabilize as much as is ever legally possible, the new family unit without going so far as to sacrifice pre-existing emotional ties the child may have with the non-custodial parent. Step-parent adoptions seem to be used quite often for the wrong reasons and thus tend to pervert the true purpose of adoption, which is to place parentless children or unwanted children into families. The child in a step-parent adoption situation seems to have a different problem entirely: he has "too many" parents and he is "wanted" by all of them. If adoption is meant to serve the child's interests, surely we should question step-parent adoptions which appear to serve solely the purposes of the adults involved. When adoption legislation is allowed to be used, as it often is in step-parent cases, to interfere with a court order made at the time of divorce or to maliciously "punish" the non-custodial parent or to simply get rid of him or her as an unpleasant reminder of the past, surely the Court should scrutinize such applications with great care. In the words of Bissett-Johnson:

> What is desirable is that the child should be able to enjoy the benefits of both the absent natural parent's affection and that of the step-parent with whom he lives. Neither should be artificially cut out of the child's life by the law until all reasonable efforts have been made to enable the adult parties and the child to come to terms with the reality of the situation. Only where it is impossible should the absent parent be completely cut out of the child's life. Counselling of more couples at the time of divorce about the problems which they face, or may face in the future, remains a desirable goal. Unfortunately, not all those who could be helped by such counselling are ready to seek it (those who need it most may be amongst the most reluctant) and even if more people sought help, it is uncertain whether the existing resources are now available.[33]

Adoption and Access: Yes or No?

The corollary problem of step-parent adoption is that of the child's access to his other natural parent, and, by extension, access to

members of the other parent's family, including, especially, grandparents--who often protest vehemently to a step-parent adoption even when their own child is quite prepared to consent to it.

As we have remarked elsewhere in this study, in no Canadian jurisdiction are the adoption provisions phrased in such a way so as to suggest that an adoption order is anything but a complete severance of all former parental ties. In fact, the refusal of the non-custodial parent to consent to a step-parent adoption is principally motivated by his knowledge that the adoption order will act as a sort of guillotine cutting him off forever from his child's life. As McIntyre, J. said when dispensing with the natural father's consent to adoption in one British Columbia case: "It follows that the father's application for access to the children must also fail, since the order for access would be inconsistent with the adoption."[34]

Yet the "guillotine rule" is seen by many judges today as being perhaps overly draconian. Oppel cites O'Hearn, C.C.J. in Nova Scotia, who has often stated in his judgments in step-parent adoption cases that he wished he could make access of the natural parent a "condition" of the adoption order.[35] And in private conversation at least two Alberta Queen's Bench judges (Justices Miller and Wachowich) have expressed great concern over their perceived inability to preserve visitation rights to a natural parent upon the granting of an adoption order in Alberta. Judges quite often express the wish in

obiter that despite the order for adoption the custodial parent will continue to allow the other parent to have access to his child--even though such wishes carry no legal force whatsoever.

We have also discussed, however, the cases from British Columbia (Kerr v. McWhannel and McWhannel and North v. North) which do seem to allow post-adoption access[36]; and in relation to Indians and adoption we have reviewed the Supreme Court of Canada decision in Natural Parents v. Superintendent of Child Welfare and Petitioners for Adoption[37] which held that a particular status granted by a federal statute cannot be defeated by the operation of a valid provincial law dealing with adoption. The Natural Parents decision may indeed provide Canadian courts with two potential arguments as to why a non-custodial parent's access is not affected by a final order for adoption.

A first assumption would have to be made, that access is to be perceived as a "right" of the child. If that assumption is made and the reasoning of Natural Parents applied, the operation of the doctrine of federal paramountcy would preclude any provincial adoption legislation from altering a child's status so as to deprive him of his "right" to access (granted in the decree nisi of divorce) after an order is made for his adoption. On the reasoning in Kerr v. McWhannel, paramountcy would operate so as to preserve the parent's access rights even though the provincial adoption order would

extinguish his rights as parent *per se*.

If this type of reasoning is applied by other Canadian jurisdictions, we may indeed see (despite the wording of the adoption legislation) a trend toward a kind of "conditional" adoption order whereby, in the proper case, an access order could be appended to the order for adoption. In this way the custodial parent and spouse could offer the child any positive features of a new legal status, and the non-custodial parent would be able to retain his access rights. As Weiss suggests, "This possibility would probably have a beneficial effect in that it would decrease opposition to the adoptions in those cases where the non-custodial parent fears the loss of access rights, and it would forestall applications to adopt where the major reason for wishing to adopt a child is to exclude the non-custodial parent from the child's life."[38]

Clearly a major question of principle remains: do we feel that it is in the child's best interests to continue to have access to his natural (non-custodial) parent after adoption or do we feel that this should be avoided? Goldstein, Freud, and Solnit in *Beyond the Best Interests of the Child* argue strongly that we should not grant legally enforceable access to a non-custodial parent:

> Once it is determined who will be the custodial parent, it is that parent, not the court, who

> must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is designed to protect the security of an ongoing relationship--that between the child and the custodial parent.[39]

However, other child psychologists and child welfare professionals strongly disagree with the "psychological parent" concept advocated by Goldstein et al. Many of them insist, along with Gardner, that such a practice is "like placing lethal weapons in the hands of children or incompetents."[40]

> An enraged parent, at his or her whim, may unilaterally decide to cut the children off completely from the ex-spouse for reasons that may be quite frivolous. The children will be deprived of all the benefits to be derived from contact with the other parent. When a parent wants to see the children and they wish to see him or her, it is rare that a third party (whether spouse or court) is justified in

> interfering with their getting together. It is only in very unusual circumstances that such interference can be in the children's and the parent's best interests.[41]

Littner, too, emphasizes the positive value of continuing access to a parent post-divorce (and presumably, post re-marriage of the parents, and post-adoption as well):

> What is in the child's best interests in terms of visits with the other parent? As I have already emphasized it is crucial to try to maintain contact between the child and the parent who has left the home. Maintaining some form of contact (a) helps the child deal with his unconscious fantasies about the absent parent, fantasies which are far more terrible than anything the absent parent can be or do; (b) helps to decrease the child's feelings of rejection and abandonment; (c) decreases his feelings that this has happened because he is a bad child; and (d) minimizes his fear that he may never see the other parent again.[42]

Conversely, continued access may have the negative effect of allowing

the child to pretend the divorce never happened or to foster hopes of some kind of reconciliation between his "real" parents.

It is the feeling of this writer, however, that as a general rule, step-parent adoptions are to be avoided if there is any possibility at all of the child's maintaining an ongoing tie with the non-custodial parent.

However, if the step-parents and the child feel that adoption is the legal process which they truly desire in order to effectively build a new family unit, then current adoption legislation should be amended in order to provide for the incorporation of any access order granted to the non-custodial parent into the final order for adoption unless the Court is satisfied that it would not be in the best interests of the child for such access to continue.[43] It is submitted that the Natural Parents decision allows this possibility and that all things considered, the child's best interests would be served in allowing for it. A final possibility, of course, is legislative amendment to the various adoption statutes to specifically provide for access to be ordered after adoption in the manner of s.100 of the Manitoba Child Welfare Act.

Private Adoption--Present and Future

"Newborn babies for sale in Alberta," "Webber was told of baby sale

fears," announce front-page headlines in a series of articles appearing in the Edmonton Journal of March 1985.[44] A story from Toronto headlines "Campus search for babies"[45], and the Globe and Mail book section features a review of The Baby Chase titled, "Adoption for a fee."[46]

In no other area of contemporary adoption practice does there appear to be such a sensationalized interest in the law of adoption as in the area of private adoption. Lurid tales of baby brokers, shady lawyers, and unethical physicians preying on young unwed mothers--offering new cars, trips to Hawaii, and large sums of cash in exchange for a voluntary consent to adoption of a newborn infant--are the subject not only of coffee break chatter but also of more serious groups, i.e., lawyers and social workers, to name two. In Alberta, couples frustrated by a waiting period of up to three years after being approved as adoptive parents (the list has now been closed to new applicants because of the long delays involved between approval and receipt of a child) are turning to private adoption as the only way to adopt a child within a reasonable period of time after making the personal decision to do so. The Adoption Resource Centre in Edmonton has predicted that in Alberta, at least, the movement toward private adoption is a trend which will continue.[47] Increased availability of abortion and increased numbers of unwed mothers (usually teenagers) who elect to keep their babies are two factors which have contributed to the declining number of available adoptable

infants.[48] If prospective adopters are not prepared to adopt an older child or a child with some physical or mental handicap (a "child with special needs"), then a private adoption is often the only possible alternative.

As we have detailed elsewhere in this study of Canadian adoption, private placement is totally legal in Alberta, British Columbia, Manitoba, New Brunswick (if the parent does the placing), Newfoundland, Prince Edward Island, Quebec, Saskatchewan, the Northwest Territories, and the Yukon.[49] There are various regulations in place regarding by or with whom the private placement is allowed, what forms of notice to provincial authorities are required and within what time frames, the penalties for failure to notify, and various forms of prohibition concerning payment in connection with the facilitation of an adoption or the obtaining of a consent to adoption. Private adoptions are currently not possible in Nova Scotia or Ontario although the new Ontario Act apparently contains loopholes which will allow a private placement to take place, avoiding the statutory placement provisions relating to agencies and licensees which are currently required.[50]

The problems raised by these often melodramatic and exaggerated accounts in the popular press are nonetheless genuine ones which go to the heart of our society's philosophy regarding the adoption process in general. In the absence of careful pre-placement

selection and preparation of adoptive parents, there is a real risk to the child of being placed in an unsuitable home. The question of money also figures prominently here as undue pressure can easily be exerted on a mother (who is obviously experiencing high levels of vulnerability in any case) to give up her child--and who then attempts to revoke that consent later on. (Whether or not she would be successful is not the issue here; it appears simply that private placement involves a greater risk of attempted revocation--and thus a greater potential for upset to the child and to the adoptive parents--than other types of adoption.) There is the further risk that the child adopted may have some physical or mental impairment about which the adoptive parent knows nothing at the time of adoption.

Some Canadian jurisdictions have attempted to deal with private adoption placement "problems" through legislative provisions. The Manitoba Child Welfare Act provisions concerning private adoption are in fact modeled along the lines recommended by the United States Children's Bureau. No private placements are allowed (other than with the spouse of the parent of the child) without the prior written approval of the Director of Child Welfare or an agency (which includes a children's aid society within Manitoba or outside Manitoba any person or organization approved by the minister charged with administering the Child Welfare Act).[51] Yet once again there is a principle involved: do we want to decrease government involvement in

adoption? Do we want to privatize the procedure?

Mike Ozerkevich, Alberta's deputy minister of Social Services, has stated, for example, that Alberta's new Child Welfare Act "falls in line with the wishes of most Albertans who don't believe adoption should be a government function."[52] He has predicted that private agencies will "spring up to meet the demand"--although no licensing procedure for private agencies is being considered. In response to the government's position, Margot Herbert, chairman of the Edmonton Committee on Child Abuse and Neglect; Clare Marcus, editor of Exchange, a Vancouver-based adoption newsletter; Marion Palmer, supervisor of social work for Edmonton's Misericordia Hospital; and Marie MacDonald, manager of social work for Edmonton General Hospital have all agreed that the privatization of adoption will ultimately not be in the child's best interest.[53]

As an alternative to agency (government or private) adoption, private (or independent) adoption is here to stay. The problems of this method of adoption are best addressed, it is submitted, by properly drafted legislation which in turn must be strictly complied with. Regarding the "babies for sale" specter, provincial legislative provisions relating to the penalties for payment should perhaps be strengthened. The lack of evaluation of the prospective adoptive home could be met by a required home study for every adoption (as will now be the case in Alberta). The lack of counselling for the

natural parent and the adoptive parents can also be mandated legislatively if this is felt to be a necessary part of the adoption process. Further legislative guidelines are also needed in most jurisdictions regarding the role of the intermediaries in private adoptions and how their fees are to be established. British Columbia, as we will see, has already moved in that direction.

Adoption and the Putative Father

In today's changing society it is perhaps fair to say that if the road to single fatherhood is rocky, the road to unwed fatherhood is all but impassable. Cruickshank even refers to the putative father as a "forgotten" father in Canadian law.[54] However, with the arrival of the Canadian Charter of Rights and Freedoms, putative fathers arguably have a strong basis on which to challenge aspects of the adoption process which have heretofore denied them a voice, most specifically a right to challenge those provisions of provincial legislation which give to the mother of the illegitimate child sole guardianship, thus sole control of placing that child for adoption if she so elects. If these sections are struck down as unconstitutional, then the putative father will indeed have the right, for example, to request custody of his child before the child is placed for adoption with strangers. Obviously the court has a discretion here which would in all probability often be exercised against the putative father (applying the "best interests" test); but the

principle of granting equal rights to "parents," whether married or not, seems to be becoming more entrenched, despite vocal criticism from various groups (feminists, etc.).[55]

Since an adoption order terminates all former parental rights, the threat of its finality "magnifies the importance of decisions made by all parties to an adoption"[56] and the question becomes one of determining whose rights and what rights are terminated at what time. Although it is easy to argue that a putative father does not have any "legal" status and therefore ought to be shut completely out of the adoption process, it would seem, realistically speaking, that there are few genuine justifications for completely ignoring an interested father, putative or not. The interests of an efficient adoption system (allowing the putative father to enter the process is often cited as a "slow-down" to the timely placing of a child in a good adoptive home) should be balanced against the potential of a meaningful father-child relationship.

The present situation in Canada (but one which will doubtless change within the next year or two) is that only those persons who must consent to an adoption are entitled to notice; thus, in the case of an illegitimate child, this means the mother alone. Only in Ontario and Prince Edward Island is notice to the father of an illegitimate child required and that only where the child is living with and being maintained by the father.[57] Thus putative fathers in Ontario and

Prince Edward Island who have shown what Cruickshank terms a "sufficient interest" in their child are indeed notified.

The leading case in this area is Re Lyttle[58], where the mother and child had lived with the putative father for some thirteen months before she left and secretly placed the child for adoption through a termination hearing. The father's "right to notice" was applied to the adoption hearing proceedings as a matter of law and convenience (since the child's best interests were involved, a new termination hearing was not ordered); but the putative father's legally recognizable interest in the child was grounded in the father's relationship to the child from birth and to his voluntary support payments. The categories of putative fathers (defined in the Ontario Act)[59] to whom notice of adoption hearings is required were developed in response to this case and should, it is argued, be a standard adopted by all Canadian jurisdictions.

Cruickshank also argues that an opportunity to be heard in adoption proceedings is concomitant with the right to notice if the putative father's wishes are to have any practical impact. Besides having a basis in natural justice, this would also serve to place the putative father in the analogous position to that of a divorced father--but without going so far as to give him the power to consent to the adoption.[60] It is arguable that if all reasonable efforts to serve the putative father with notice are unsuccessful in bringing him to

court before the child is placed for adoption, then his "father's" rights should be terminated (with perhaps a short appeal period instituted to give him one final chance).

Although it would seem clear that notice to interested putative fathers ought to have a much wider application (so long as it remains practical and timely), the right of the putative father to consent to his child's adoption should remain a limited one (Charter arguments to the contrary). Most critics of granting rights to putative fathers in adoption proceedings inevitably voice their fears that if granted the right to consent to adoption, the putative father would simply use it to block an adoption placement and cause further difficulties to the mother. In this respect, it must be noted, however, that even if he were granted a consent right, all provincial adoption legislation currently contains provisions for dispensing with consent if in the child's best interest; and presumably this judicial power could easily be invoked in the case of a consent arbitrarily withheld by a putative father.

Cruickshank points out, however, that there are valid reasons for perhaps limiting the putative father's ability to consent to his child's adoption. Since the dispensation of consent remains at the court's discretion (and the parental rights doctrine is not dead in Canada by any means), it can never be relied upon as a "sure thing" waiver in the case of a putative father who refuses to consent.

Furthermore, the administration of such rights and applications to dispense with them would undoubtedly cause unnecessary litigation and delays in placing a child--and could also simply discourage the mother from surrendering the child in the first place (if she knew of a potential blocking of the placement by the "uninterested but capricious" putative father.[61] Adding yet another consent provision to the already formidable consent requirements would also add to the uncertainty experienced by prospective adopters.

Thus it is arguable that a consent right (as opposed to a right of notice) should only be available to the putative father when the child is living with him and is being maintained by him. If the unwed parents are living together and supporting their child, then they should both have a right to consent to the adoption. If the putative father indeed meets this test of "sufficient interest" and is granted a consent right, it should be revocable only during a short period.

The role of putative fathers and the expansion of their rights respecting their children is an area of the law which is showing rapid change. Given the implications of the Charter, we can only emphasize that the principles of natural justice and due process will have to be applied to a putative father. It is only through gaining procedural equality with others who are interested in the child that the putative father will at last have a fair opportunity to make his

relationship with his child a "legal" reality. He will perhaps no longer be able to rely solely on the fact of his paternity to make his case against third parties (prospective adoptive parents, for example), but the relationship he offers the child should allow a tribunal to consider that relationship "on an equally weighted balance of the child's best interests."[62 63]

Adoption and Surrogate Motherhood

One of society's newest responses to a couple's infertility problem is the surrogate motherhood phenomenon. Without entering into any of the ethical, social, or moral dilemmas which abound when this subject is broached, we shall here attempt instead to simply outline the problems in utilitizing surrogate motherhood in Canada as it relates to the adoption process.

In surrogate situations, where a "replacement" mother artificially inseminated bears the child for the natural father and the "psychological mother" (his wife), in no Canadian province would the natural father of the child be presumed to be its father--even if he were to obtain a declaration of paternity. Thus in most provinces a notice of placement for private adoption would have to be given to provincial authorities, who would then have to conduct an investigation of the "adoptive" home, etc.

In jurisdictions like Ontario, which prohibit placement of a child for adoption by anyone other than a prescribed agency, what happens in a surrogate motherhood scenario? Presumably these "adoptions", too, must be processed through a licensee or private agency--a very unlikely possibility. In other jurisdictions which do permit the placement of a child for adoption with a relative (without the normal "private placement" sanctions) the child produced by the surrogate mother could conceivably be placed with the natural father. However, if the placement is limited, as it sometimes is, to placement by or with the mother, we have a large problem since, as noted above in our discussion of putative fathers, the biological father of a child born to a woman who is not his wife has no presumed parental status. (Either he is omitted from the definition of "parent" altogether or, as in the case of a married surrogate, another male person's paternity is assumed.) If the presumption of paternity is rebuttable, then presumably a natural father would be forced to bring an action for a declaration of paternity--an application which a married surrogate's husband would be free to defend and which he might even win.

Even if the natural father in a surrogate arrangement can manage to get himself declared the legal father of the child, he must still then bring his wife into the picture by notification to the provincial authorities for approval of the adoption placement. Notice of private placement of the child by the person who places and/or the

person who receives the child is required, and an investigation would then in all probability be undertaken by provincial authorities. Any infraction of placement provisions involves, as we have noted elsewhere, fines and/or jail terms.

A further complication involved in surrogate motherhood and adoption is the prohibition against payment in any form, directly or indirectly, for the placement of or consent to the adoption of a child. In surrogate motherhood, medical expenses and a "service" fee (sometimes as much as $30,000) are usually involved; and because there is no legislation currently in place which permits surrogate motherhood arrangements for pay, the parties would appear to be bound by existing laws intended to prevent "black market" baby sales.

An amendment to the British Columbia Adoption Act in 1980[64], however, does provide for sanction of payment by application prior to the making of any payment. Thus a person may apply to the Court or to the Superintendent of Family and Child Services for approval of advertising or payment in connection with the adoption of a child. In Re Adoption Act[65], for instance, an application was made to authorize the payment of medical, legal, and travelling expenses by prospective adoptive parents to the natural mother, who had made such payment a condition of her consent to the adoption. Huddart, L.J.S.C. found that the expenses had been actually incurred and paid for by the mother, that they were reasonable, and that the mother had

not been coerced into placing her child for adoption (she had had independent legal advice) and granted the application, suggesting that in the proper case "other expenses" could also be allowed. Erlenbusch points out that although the British Columbia court expressed the view that this legislation was intended to prevent baby selling, "there are those who would argue that in fact such legislation allows baby selling in that there is scope for judicial discretion in allowing for any payment the court deems proper."[66]

The situation in Canada of surrogate motherhood combined with adoption proceedings can best be summarized as follows:

> Although all Canadian provinces also have legislation recognizing out-of-province adoptions as binding in the province of residence of the adopting couple, since none permit payment and/or nonreporting of payment, Canadian couples interested in having a surrogate mother bear their child in Canada have to find someone willing to act gratis, probably have to process as a private placement adoption (even after obtaining a declaration of the natural father's paternity) with the attendant investigations of their suitability and run the risk that the surrogate mother will refuse her consent once

> given. Because of the difficulty of finding a surrogate who would not require a fee, or because the couple viewed their classification as "adoptive parents" as artificial and the investigation of their suitability as an unwarranted intrusion into their private lives, the couple might elect to have the surrogate mother register as the natural father's wife for the child's birth and to pay the surrogate mother quietly for her services. The couple and the surrogate mother would be liable to penalties for falsification of the birth records and for giving and receiving payment for the placement of the child.[67]

Erlenbusch argues that all of this complexity (and deception) would be unnecessary if specific legislation were designed to take into account the intricacies of surrogate motherhood. She suggests that in such arrangements when the child is born, the biological father and the psychological mother should be listed on the birth registration as the child's parents and should immediately take the child into their custody. "As a parallel to the artificial statutes already in existence, the child should be deemed a child of the couple's marriage. There should be no further requirement for formal adoption by the psychological mother, nor any further consent by the

surrogate."[68]

The possible problems which might result in Canadian law if surrogate motherhood arrangements were to gain in popularity is clear--and Erlenbusch's proposals seem eminently reasonable once the original assumption is made that surrogate motherhood ought to be a viable route to parenthood. One wonders, however, if Canada will elect to follow the example of the United States, where surrogate motherhood seems to be acquiring a certain acceptability, or whether we will follow the lead of England, where in the aftermath of the Baby Cotton case, surrogate motherhood is statutorily prohibited.

Adoption and Subsidies

As we have mentioned in our foregoing discussion of adoption, the traditional view has required that the child be placed in an adoptive home which is economically capable of caring for, maintaining, and educating him. The adopted child, "as if" born to a second set of parents, has been obliged to share their economic lot (and given that the adoption could only be ordered if it was in the child's best interests, that economic lot was usually quite a happy one).

This particular assumption began to be challenged in the 1960's when in the United States concern was felt at the inability to place children because of the prohibitive financial burden which would have

to be incurred by an otherwise eminently suitable adoptive family. In other words, adoption began to be seen as a process available only to those of a favoured economic class, and it became obvious that children from minority groups often had very little chance of being adopted because so many prospective adopters from minority groups could not afford the expense. Similar situations were found with older children, sibling groups, and children with physical or mental handicaps. Often there were interested adopters, but they simply could not handle the expense involved in adopting, for example, three siblings or a child with a medical problem requiring ongoing treatment.

By 1976 almost all the states had enacted some form of adoption subsidy legislation in order to alleviate these problems; and currently in 1985 Alberta, Ontario, Quebec, Manitoba, Saskatchewan, and the Yukon also have legislation in place providing for adoption subsidies for children with special needs. Children traditionally considered unadoptable are now candidates for adoption because of such legislation, and child welfare workers are increasingly attempting to shift prospective adopters' near total obsession for newborn infants to other children who would also benefit greatly from being adopted.[69]

One can only express the hope that this combination of increased public education and increased subsidies will allow this particular

trend to continue--so that adoption can begin at last to lose some of its "elitist" image and address the real life social problems of unwanted children in contemporary society. We no longer have the "problem" of a vast oversupply of illegitimate babies. Our unwanted child population today is older, belongs often to a racial minority, and may have some mental or physical handicap. Surely the traditional philosophy underlying all adoption law and practice must now seek to use the mechanism in order to help those children who need it most.

Adoption and the Charter

CTV's "Canada AM" program of May 31, 1985, featured an interview with Mel Finley, Executive Director of the Metropolitan Toronto Children's Aid Socoety, who discussed the ramifications of the coming into force of Section 15 of the Charter of Rights and Freedoms. Although the general policy of the Ontario children's aid societies is still based on the "best interests of the child," the children's aid societies are also aware that their particular "guidelines" regarding the selection and approval of prospective adoptive parents puts them on a direct collision course with the provisions of s.15 and may provoke, in the words of Mr. Finley, "legal action against us by anyone who 'loses' in the adoption process."[70] What about age requirements for adoptive parents? Sexual preference of the adoptive parents? Marital status? Economic variables? In short, could a family--or a

child-- bring an action for "improper placement" using the Charter in aid? The answer, it is submitted, is quite clearly yes.

Further to these concerns, CBC television's The Journal on June 25, 1985, focused on "Adoption and the Charter" and featured Barbara Frum interviewing Dr. Barbara Landau (a lawyer and child psychologist), Mr. George Caldwell (of the Ontario Children's Aid Societies), and Dr. David Kirk (author of several well-known and respected studies on adoptive kinship). The basic question for the interviewees was the issue of whether adoption is to be considered a "right" or a "privilege."

Landau argued that there is certainly a "right" to apply to become an adoptive parent and that since normative values have shifted in Canada from the time our adoption laws were originally drafted, courts should indeed consider challenges to adoption "rules" of selection which discriminate on the basis of age, sex, or marital status. She argued that if individual cases were to be examined and if litigation were to proceed, eventually adoption legislation and the adoption process itself would become more flexible, more egalitarian, and thus ultimately benefit more children and society as a whole.

Caldwell and Kirk, however, argued that adoption is not a right but a privilege and that children's aid societies or private agencies or

the government must be free to set up guidelines and evaluative criteria by which they can choose the "best" parents to receive the privilege of becoming adoptive parents. To allow the "losing" prospective adopters (ie., those who are less well educated, less financially well off, less "young", less "stable" in their living arrangements) to challenge the decision of a children's aid society or to challenge the constitutionality of a provincial adoption statute is to allow the child's "best interests" to be seriously compromised.

Landau countered that the proper procedure is to match the child in need of a home to an acceptable home for that particular child and not to pre-select the "best homes" in which to place children in need of a family. However, Kirk and Caldwell felt that the proper procedure was to establish a pool of "acceptable" adopters first and then proceed to placement of a child "acceptable" to them.

It is very clear, given what we have already discussed regarding the question of sealed records and the role of the putative father that the Charter is going to have tremendous implications on the next decade of Canadian adoption litigation. To date there are no reported cases, but most provincial governments and children's aid societies are preparing for them in the near future. While the focus of attention so far has been primarily on the "rights" of the adults of the adoption triangle, it must also be noted that children's

rights proponents may be interested as well in utilizing the Charter in the area of adoption.

Eskimo and custom adoption, adoption as it relates to Indians, step-parent adoptions and post-adoption access, the rights of a putative father, adoption subsidies, conflict over sealed records versus the "right to know" one's origins, and the effect of the Charter of Rights — all of these are issues and questions which were virtually non-existent when adoption first became legally possible in Canada. For some of these issues, we still need legislative clarification. For others it would appear that only the passage of time and/or an evolution in social attitudes will provide solutions.

Adoption remains, it is submitted, a viable and extraordinarily beneficial way of reorganizing families or providing families for those who have none. As a modern practice, however, it does retain many cumbersome relics from the past which might best be jettisoned in a Canadian society which is presumably more open and honest about relationships and "status" than Canadian society a century ago. With an ongoing dialogue between society, the legislatures, and the courts, one can only hope that by the next century, adoption will have succeeded in establishing the proper equitable balance among the interests of all the members of the adoption triangle and those of society as well.

NOTES

[1] For a lively account of Mr. Justice Sissons' approach to applying statutory law in the Northwest Territories, see his highly entertaining autobiography, Judge of the Far North (Toronto: McClelland & Stewart, 1973).

[2] Re Katie's Adoption Petition (1961), 38 W.W.R. 100.

[3] Northwest Territories Adoption Ordinance, Revised Ordinances of the Northwest Territories 1956, c. 1.

[4] Justice W.G. Morrow, "Custom Adoption Law," in Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984), p. 245.

[5] Re Katie's Adoption Petition, supra, note 2, p. 104.

[6] Ibid., pp. 101-102.

[7] Morrow, op. cit., pp. 248-249.

[8] Re Deborah E4-789, Tucktoo v. Kitchooalik and Enooyak, [1972] 3 W.W.R. 194 (N.W.T. Terr. Ct.).

[9] Re Deborah E4-789, [1972] 5 W.W.R. 203 (N.W.T. C.A.).

[10] Re Indian Custom Adoptions, Re Beaulieu's Petition (1969), 67 W.W.R. 669 (N.W.T. Terr. Ct.).

[11] Ibid., p. 670.

[12] Re Wah-Shee (1975), 57 D.L.R. (3d) 742.

[13] Ibid., p. 745.

[14] Morrow, op. cit., p. 251.

[15] Ibid.

[16] See, for example, Margaret Jackson's work on native offenders in the Territories or Douglas Sanders' report for the Law Reform Commission of Canada, "Family Law and Native People" (August, 1974).

[17] Natural Parents. v. Superintendent of Child Welfare and

Petitioners for Adoption, [1976] 1 W.W.R. 699 (S.C.C.), reversing (sub nom. Re Birth Registration No. 67-09-022272) [1974] 3 W.W.R. 363, 14 R.F.L. 396, 44 D.L.R. (3d) 718 (B.C.C.A.), which reversed [1974] 1 W.W.R. 19, 13 R.F.L. 244 (B.C.S.C.).

18 Nelson v. Children's Aid Society of Eastern Manitoba, [1975] 5 W.W.R. 45 (Man. C.A.), affirming [1974] 5 W.W.R. 449, 46 D.L.R. (3d) 633 (Man. Q.B.).

19 In the Natural Parents case, the British Columbia Supreme Court judge dismissed an application by a non-Indian married couple to adopt an Indian child on the grounds that the operation of the provincial adoption legislation would affect the child's status so as to extinguish the peculiar rights which were his as an Indian. An appeal was allowed against the trial judge's finding at the Court of Appeal level in British Columbia, and an appeal from that order made to the Supreme Court of Canada was dismissed and the adoption allowed, the Supreme Court of Canada holding, per Laskin, C.J.C., that the British Columbia Adoption Act must be inferentially incorporated into the Indian Act and thus if any portions of it in its treatment of Indians are inconsistent with the Indian Act, those provisions have no effect. However, there are no inconsistencies between s.10(2) of the British Columbia Adoption Act and s.11(1)(d) of the Indian Act since the adopted Indian child remains entitled to be registered as an Indian under the Indian Act. Ritchie, J. agreed with the majority decision but reasoned that a provincial law of general application is binding on all citizens of the province including Indians providing it does not affect a right granted to an Indian under the Indian Act. Since the adopted Indian child retains his right to be registered as an Indian, his Indian status is unaffected by the provincial adoption statute and no constitutional conflict exists. The Nelson case from Manitoba concerned a 1972 Family Court order which granted permanent care and custody of the five Nelson children (who were of Indian parentage) to the Superintendent. Two children were placed for adoption and had been adopted, and the other three were placed in foster homes. Mr. and Mrs. Nelson applied to regain custody of their children, arguing that insofar as the Manitoba Child Welfare Act purported to affect the rights or interests of Indians, it was unconstitutional and that provisions of the Act relating to permanent custody orders and adoption could have no application to Indians because they were in conflict with provisions of the federal Indian Act. The application was refused at trial; and on appeal to the Manitoba Court of Appeal, the reasoning of the British Columbia Court of Appeal in Natural Parents was applied and the comments of Mr. Justice Ritchie in the Supreme Court decision anticipated. Subsequently several provinces, in an abundance of caution, actually amended their respective adoption statutes in order to state specifically that adoption does not affect

an Indian child's rights as an Indian. However, in the absence of specific statutory provision, it would still seem abundantly clear that Canadian law on this question is now settled.

20 Joseph C. Ryant, "Some Issues in the Adoption of Native Children," in Paul Sachdev, ed., Adoption: Current Issues and Trends (Toronto: Butterworths, 1984), p. 169.

21 Alfred Kadushin, Child Welfare Services (New York: Macmillan, 1974) (2nd edition), pp. 589-590.

22 Ryant, op. cit., p. 170.

23 Ibid., p. 172.

24 See, for example, the rather dramatic account of the Bittern family whose twin toddlers, Viola and Violet, aged 2 1/2, were taken by child welfare workers in Manitoba and placed for adoption in the United States: "The shocked parents spent 12 frustrating years trying to find the youngest of their 11 children, not knowing they had been sent to the United States for adoption." CP Press Services, Winnipeg, "Tearful Natives Swap Tales of Children's Aid Baby-Snatchers," (Toronto Globe and Mail, 18 July 1985), p. 8.

25 Ryant, op. cit., pp. 177-178.

26 Alberta Child Welfare Act, S.A. 1984, c. C-8.1, s. 73(5)(6).

27 All the current literature on step-parents, step-children, and step-families points to the long time factor involved before any kind of positive bond can be said to have formed between those in "step" relationships. Even the eminent baby expert, Dr. Benjamin Spock, has recently commented on his own problems of "authority" when he became stepfather to his wife's daughter from his wife's first marriage.

28 R.S.C. 1970, c. D-8.

29 Wilfred Oppel, "Step-Parent Adoptions in Nova Scotia and British Columbia," Dalhousie Law Journal (1981) p. 647. See also subsections 10(3) and 11(3) of the Children Act 1975 (c. 72, U.K.) which provide that where an adoption application is brought by a parent and step-parent, the court shall dismiss it if it considers it better dealt with under s. 42 (order for custody, etc.) of the Matrimonial Causes Act 1973 and that an adoption order on the application of the parent alone shall not be made unless the Court is satisfied that the other parent is dead or cannot be found or there is a reason for justifying his/her exclusion.

30 Wolfe v. Cherrett (1978), 28 N.S.R. (2d) 17 (N.S.S.C., A.D.), p. 31.

31 Equal Guardianship of Infants Act, R.S.B.C. 1979, ss. 6, 7, 13, 15.

32 British Columbia Commission on Family and Children's Law, Fifth Report, Part VI--Custody, Access and Guardianship, pp. 52, 55.

33 Alastair Bissett-Johnson, "Step-Parent Adoptions in English and Canadian Law," in The Child and the Courts (1978) p. 350.

34 Re Adoption Nos. 60-09-017014 and 62-09-027718, [1972] 1 W.W.R. 759 (B.C.C.A.), p. 765.

35 See, for example, Re Hill (1975), 20 N.S.R. (2d) 528, p. 534.

36 See our discussion, supra.

37 Natural Parents v. Superintendent of Child Welfare and Petitioners for Adoption, supra, note 17.

38 Paula Barran Weiss, "The Misuse of Adoption by the Custodial Parent and Spouse," Canadian Journal of Family Law (1979), p. 151.

39 Joseph Goldstein, Anna Freud, and Albert J. Solnit, Beyond the Best Interests of the Child (New York: Free Press, 1973), p. 38.

40 Richard A. Gardner, Psychotherapy With Children of Divorce (New York: J. Aronson, 1976), p. 335.

41 Ibid.

42 Ner Littner, "The Effects on a Child of Family Disruption and Separation from One or Both Parents," 11 Reports of Family Law 1 (1973), p. 15.

43 The proposed changes to the federal Divorce Act regarding custody (ie., joint custody as a point of departure unless the Court is satisfied that some other custody award is appropriate) will obviously have repercussions in the area of step-parent adoption and "access" as related to adoption.

44 Lorraine Locherty, "Newborn babies for sale in Alberta," (Edmonton Journal, 27 March 1985), p. 1; Duncan Thorne and Lorraine Locherty, "Webber was told of baby sale fears," (Edmonton Journal, 28 March 1985), p. 1.

[45] Canadian Press, Toronto, "Campus search for babies," (Edmonton Journal, 12 July 1985).

[46] Nancy Wigston, "Adoption for a fee," (Toronto Globe and Mail, 16 June 1984), p. 16. Review of Tony Kornheiser, The Baby Chase (Toronto: McClelland and Stewart, 1984)

[47] Marilyn Shinyei, Director, Adoption Resource Centre, Edmonton, Alberta, quoted in Linda Goyette, "Couples look to private adoption" (Edmonton Journal, 18 April 1985).

[48] In 1980 in Alberta 656 adoptable babies were born while in 1984 there were only 440. With a waiting list of over 1500 already approved adoptive couples, the problem is clear.

[49] See, supra.

[50] Ontario Child Welfare Act, R.S.O. 1980, c. 66, s. 65(1), (4). In Ontario adoption "licensees" are included in the category of organizations which may place children for adoption within the province. Licensees are charitable organizations other than children's aid societies authorized by the Director of Child Welfare to maintain an adoption agency. Such private agencies, however, are still required to notify the Director, in advance, of intended adoption placements. No person in Ontario can receive a child for adoption without the Director's approval.

[51] Manitoba Child Welfare Act, S.M. 1974, c. 30, as amended, s. 102(1) and (3).

[52] Lorraine Locherty, "Experts challenge 'elitist' adoption laws," (Edmonton Journal, 28 March 1985).

[53] Ibid.

[54] D.A. Cruickshank, "Forgotten Fathers: The Rights of the Putative Father in Canada," 7 Reports of Family Law (1972), pp. 1-61.

[55] See, for example, Lorraine Locherty, "Unwed mum plans to fight adoption rule," (Edmonton Journal, 3 August 1985), p. B-1; Lorraine Locherty, "Fathers' adoption rights criticized," (Edmonton Journal, 10 August 1985), p. B-1; Lorraine Locherty, "Ruling opens 'can of worms' on adoption," (Edmonton Journal, 17 August 1985), p. B-1.

[56] Cruichshank, op. cit., p. 46.

57 See our discussion, supra. Note that in Manitoba and Nova Scotia the courts have a discretion to order notice to the putative father.

58 Re Lyttle, [1971] 3 O.R. 129, 5 R.F.L. 6, 19 D.L.R. (3d) 625 (C.A.) leave to appeal refused, [1972] 1 O.R. 172, 5 R.F.L. 9, 21 D.L.R. (3d) 639.

59 See, supra.

60 Cruickshank, op. cit., p. 54.

61 Ibid., p. 55.

62 Ibid., p. 61.

63 For more recent examples of Canadian cases dealing with the rights of the putative father in adoption situations, see Re D.F.T. and Attorney-General of Nova Scotia (1978), 94 D.L.R. (3d) 680 (N.S.C.A.); Re Lemon and Director, Child Welfare (1981), 127 D.L.R. (3d) 508 (Nfld. C.A.); Re Minister of Social Services and Folster (1981), 124 D.L.R. (3d) 626 (Sask. C.A.); Re B.M.F., [1981] 4 W.W.R. 171 (Man. Co. Ct.).

64 Adoption Act, R.S.B.C. 1979, c. 4, s. 15.1 [en. 1980, c. 36, s. 1].

65 Re Adoption Act (1982), 27 R.F.L. (2d) 72, 34 B.C.L.R. 177 (B.C.S.C.).

66 Phyllis Erlenbusch, "Planned Parenthood: The Surrogate Alternative," 29 Reports of Family Law (2d) (1982) p. 61.

67 Ibid., p. 63.

68 Ibid., pp. 68-69.

69 See, for example, such television features as "Wednesday's Child" or newspaper feature stories such as "Sunday's Child"--whereby a difficult-to-place child often finds an adoptive home.

70 Mel Finley in an interview with Norm Parry, Canada AM, 31 May 1985.

BIBLIOGRAPHY

ABELLA, ROSALIE S. AND CLAIRE L'HEUREUX-DUBE (eds.) Family Law. Dimensions of Justice. Toronto: Butterworths, 1983.

ABBOTT, GRACE. The Child and the State. Chicago: University of Chicago Press, 1938.

ACKLEY, N.B. "Sealed Adoption Files: When to Open? A New Approach," (1979) 17 Conciliation Courts Review 110.

"Alternatives to Parental Right in Child Custody Disputes Involving Third Parties." (1963) 73 Yale Law Journal 151.

AMADIO, CAROL AND STUART L. DEUTSCH. (1983) 22 Journal of Family Law 59.

ANCEL, MARC. L'Adoption dan les Législations Modernes. Paris: Sirey, 1958.

ARMS, SUZANNE. To Love and Let Go. New York: Alfred A. Knopf, 1983.

ASHMAN, ALLAN. "Natural mother can visit child after adoption." (1984) 70 American Bar Association Journal 128.

----------. "Rights granted grandparents in adoption proceedings." (1983) 69 American Bar Association Journal 970.

ASHMAN, ALLAN AND LAUREN-RUBENSTEIN RESKIN. "Unwed fathers get first crack at adoption." (1985) 71 American Bar Association Journal 119.

BALA, NICHOLAS AND KENNETH L. CLARKE. The Child and the Law. Toronto: McGraw-Hill Ryerson, 1981.

BARAN, A., R. PANNOR, AND A.D. SOROSKY. "Adoptive Parents and the Sealed Record Controversy." (1974) 55 Social Casework 531.

----------. "Open Adoption." (1976) 21 Social Work 97.

----------. "Secret Adoption Records: The Dilemma of our Adoptees." (1975) 9 Psychology Today 38.

BAXTER, I.F.G. AND M.A. EBERTS (eds.). The Child and the Courts. Toronto: Carswell, 1978.

BEAN, PHILIP (ed.). Adoption. Essays in Social Policy, Law, and Sociology. London/New York: Tavistock Publications, 1985.

BENET, M.K. "The Politics of Adoption." New York: The Free Press/Macmillan, 1976.

BISSETT-JOHNSON, Alaistair. "Children in Subsequent Marriages, Questions of Access, Name and Adoption." (1980) 11 Reports of Family Law (2d).

----------. "Step-Parent Adoptions in English and Canadian Law." In The Child and the Courts, ed. I.F.G. Baxter and M.A. Eberts, Toronto: Carsell, 1978.

BOLTON, ANNE. "Podolsky v. Podolsky: Intestate Succession Rights of Adopted Children in Manitoba." (1981) 11 Manitoba Law Journal 207.

BOYLE, CHRISTINE. "Custody, Adoption, and the Homosexual Parent." (1976) 23 Reports of Family Law 129.

BROMLEY, P.M. "The New English Law of Adoption." In The Child and the Courts, ed. I.F.G. Baxter and M.A. EBERTS. Toronto: Carswell, 1978.

BURGESS, I.C. The Art of Adoption. Washington, D.C.: Acropolis Books, 1976.

BURKE, CAROLYN. "The Adult Adoptee's Constitutional Right to Know His Origins." (1975) 48 Southern California Law Review, 1196.

CARR, R.M. "Adopting Out of the Faith: A Radical Approach." (1970) 38 Manitoba Bar News 136.

CARTER, F.G. "Adoption, Guardianship, Education and Religious Training of Children." (1966) 5 Western Law Review 160.

CASTELLI, MIREILLE D. "De l'Adoption et de 'l'abandon' d'un enfant légitime ou l'art de tourner la loi." (1977) 18 Cahiers de Droit 931.

----------. "La Nouvelle Loi sur l'Adoption." (1972) 13 Cahiers de Droit 567.

CHADWICK, J.B. "The Protection of the Rights of Parents Under the Child Welfare Act of Ontario." (1972) 6 Reports of Family Law 110.

CHAIKOFF, P.M. "Adoption in Ontario: An Agnostic's Position." (1964) 3 Osgoode Hall Law Journal 23.

CRUICKSHANK, D.A. "Adoption Laws: No Policy At All Is Still a Policy." (1978) 2 Canadian Lawyer 98.

----------. "Forgotten Fathers: The Rights of the Putative Father in Canada." (1972) 7 Reports of Family Law 1.

DALEY, T.T. "Adoption and Access: Recent Developments." (1976) 23 Reports of Family Law 257.

----------. "The Nova Scotia Children's Services Act." (1978) 29 Reports of Family Law 283.

DAVIES, CHRISTINE. "Custody and Adoption: Some Interrelated Problems." (1973) 23 University of Toronto Law Journal 88.

----------. Family Law in Canada. Toronto/Calgary/Vancouver: Carswell, 1984.

DAY, D.C. "Counsel for Christopher: Representing an Infant's Best Interest in the S.C.C." (1983) 33 Reports of Family Law (2d) 16.

DEHLER, D. "Interfaith Adoption." (1962) 5 Canadian Bar Journal 367.

DELEURY-BONNET, E. "La Loi d'Adoption." (1969) 10 Cahiers de Droit 759.

DERDEYN, A.P. AND W.J. WADLINGTON. "Adoption: The Rights of Parents Versus the Best Interests of Their Children." (1975) 16 Journal of the American Academy of Child Psychiatry 238.

ELLISON, MARY. The Adopted Child. London: Victor Gollance, 1958.

ERLENBUSCH, PHYLLIS. "Planned Parenthood: The Surrogate Alternative." (1982) 29 Reports of Family Law 51.

FEIGELMAN, WILLIAM AND ARNOLD R. SILVERMAN. Chosen Children. New Patterns of Adoptive Relationships. New York: Praeger Publishers, 1983.

FISHER, FLORENCE. The Search for Anna Fisher. New York: Arthur Fields, 1973.

FITZGERALD, JOHN AND BILL AND BRENDA MURCER. Building New Families

Through Adoption and Fostering. Oxford: Basil Blackwell, 1982.

GOODACRE, IRIS. Adoption Policy and Practice. London: George Allan & Unwin Ltd., 1966.

GREEN, B. "Re Mugford: A Case Study in the Interaction of Child-Care Agency, Court and Legislature." (1971) 1 Reports of Family Law 1.

GROFFIER, ETHEL. "La loi applicable à l'adoption." (1980) 40 Revue du Barreau du Québec 705.

GROVE, DANIEL. "Independent Adoption: The Case for the Gray Market." (1967) 13 Villanova Law Review 116.

Guidelines for Independent Placement. New York: Adoptive Parents Committee, Inc., 1980.

HARALAMBIE, ANN M. Handling Child Custody Cases. Colorado Springs: Shepard's/McGraw Hill, 1983.

HARVEY, CAMERON. "Intestate Succession Rights of Adopted Children in Manitoba: The Podolsky Case." (1981) 11 Manitoba Law Journal 201.

HEIM, ALICE. Thicker Than Water? Adoption: Its Loyalties, Pitfalls and Joys. London: Secker & Warburg, 1983.

HEPWORTH, H. PHILIP. Foster Care and Adoption in Canada. Ottawa: Canadian Council on Social Development, 1980.

HOGGETT, BRENDA. Parents and Children. London: Sweet and Maxwell, 1977.

HUBBARD, H. ALBERT. "Marriage prohibitions, adoption and private acts of Parliament: the need for reform." (1983) 28 McGill Law Journal 177.

HUGHES, MARGARET E. "Adoption in Canada." In Studies in Canadian Family Law, ed. Derek Mendes Da Costa. Toronto: Butterworths, 1972.

"Inter-Faith Adoption: A Symposium." (1964) 3 Osgoode Hall Law Journal 14.

ISAAC, J.A. "Infants: Adoption, Adopting Parents Claiming Custody

as Against Biological Parents." (1958) 16 University of Toronto Faculty Law Review 119.

JAFFEE, B. AND D. FANSHEL. How They Fared in Adoption. New York: Columbia University Press, 1970.

JONES, CHARLES AND JOHN ELSE. "Racial and Cultural Issues in Adoption." (1979) 58 Child Welfare 373.

JOSLING, J.F. Adoption of Children. London: Oyez, 1965.

KAWASHIMA, YASUHIDE. "Adoption in Early America." (1982) 20 Journal of Family Law 677.

KATZ, SANFORD N. "Rewriting the Adoption Story." (1982) 5 Family Advocate 9.

KENNEDY, GILBERT D. "British Columbia's New Adoption Legislation." (1957-58) 12 University of Toronto Law Journal 296.

----------. "The Legal Effects of Adoption." (1955) 33 Canadian Bar Review 751.

KIRK, H. DAVID. Adoption Kinship: A Modern Institution in Need of Reform. Toronto: Butterworths, 1981.

----------. Shared Fate. A Theory and Method of Adoptive Relationships. Port Angeles, Wash./Brentwood Bay, B.C.: Ben-Simon Publications, 1984.

KORNITZER, MARGARET. Adoption and Family Life. New York: Humanities Press, 1968.

KRAM, SHIRLEY WOHL AND NEIL A. FRANK. The Law of Child Custody: Development of the Substantive Law. Lexington, Mass./Toronto: Lexington Books, D.C. Heath, 1982.

LANDRY, REINE. Le Cri de l'Adopté. Québec: Editions Internationales Alain Stanké, 1984.

LAUZON, M. "Réflexions sur l'adoption." (1970) 5 Thémis 323.

LEARY, MORTON L. Law of Adoption. Dobbs Ferry, N.Y.: Oceana Publications, 1968.

LEVY, ALLAN. Custody and Access. London: Oyez Longman, 1983.

LIFTON, BETTY JEAN. Lost and Found. The Adoption Experience. New

York: Bantam Books, 1981.

----------. Twice Born: Memories of an Adopted Daughter. McGraw-Hill, 1975.

MADDOX, BRENDA. The Half-Parent: Living With Other People's Children. New York: Evans, 1975.

MARCUS, CLARE. Adopted? Vancouver: International Self-Counsel Press, 1979.

----------. Who is my Mother? Toronto: Macmillan of Canada, 1981.

MARKLE, W.W. "Catholic Adoptions in Ontario." (1964) 3 Osgoode Hall Law Journal 27.

MARTIN, CYNTHIA. Beating the Adoption Game. La Jolla, California: Oak Tree Publications.

MAXWELL, VICKY. The Chosen Child. London: Collins, 1973.

McNAMARA, JOAN. The Adoption Advisor. New York: Hawthorn Books, 1975.

McTAGGART, LYNNE. The Baby Brokers. New York: The Dial Press, 1980.

McWHINNIE, ALEXINA. Adopted Children: How They Grow Up. London: Routledge & Kegan Paul, 1967.

MEEGAN, WILLIAM. "Independent Adoptions." (1978) 57 Child Welfare 450.

MEEZAN, WILLIAM, SANFORD KATZ AND EVA MANOFF RUSSO. Adoptions Without Agencies: A Study of Independent Adoptions. New York: Child Welfare League of America, 1978.

MENDES DA COSTA, DEREK (ed.). Studies in Canadian Family Law. Toronto: Butterworths, 1972.

MICHAEL, D.L. "The Religious Factor in Adoptions." (1964) 3 Osgoode Hall Law Journal 14.

MORROW, W.G. "Custom Adoption Law." In Sachdev, Paul (ed.) Adoption: Current Issues and Trends. Toronto: Butterworths, 1984, 245.

O'DONNELL, F.C. "The Four-Sided Triangle: A Comparative Study of the Confidentiality of Adoption Records." (1983) 21 Univer-

sity of Western Ontario Law Review 129.

OPPEL, WILFRED. "Step-Parent Adoptions in Nova Scotia and British Columbia." (1981) 6 Dalhousie Law Journal 631.

OUELLETTE, M. "Le Nouveau Droit de la Famille et l'Adoption." (1982) 13 Revue Générale de Droit 109.

PARSONS, T. "The Law and Social Control." In M. Evans (ed.), Law and Sociology. New York: Free Press, 1962.

PETCH, J.F. "Religious Considerations in Ontario Adoptions." (1962) 20 University of Toronto Faculty Law Review 159.

PINEAU, JEAN. La Famille. Montreal: Presses de l'Université de Montreal, 1982.

PLAUT, W.G. "The Child's Rights in the Adoptive Process." (1964) 3 Osgoode Hall Law Journal 31.

PRICHARD, J. ROBERT S. A Market for Babies? Toronto: University of Toronto, Faculty of Law, Law and Economics Workshop, 1981.

RABIN, MYER. "76(3) Child Welfare Act, R.S.A. 1955, c. 39: Court Order Dispensing with Consent of Natural Parent in Adoption Proceedings, Grounds for Such an Order. Re Adoption of David Snider (1966), 56 W.W.R. 116." (1967-68) 6 Alberta Law Review 296.

RAYMOND, LOUISE. Adoption and After. New York: Harper & Row, 1974.

RAYNOR, LOIS. The Adopted Child Comes of Age. London: George Allen & Unwin, 1980.

REID, JOSEPH H. "Principles, Values and Assumptions Underlying Adoption Practice." In Readings in Adoption. New York: Philosophical Library Inc., 1963.

SACHDEV, PAUL (ed.). Adoption: Current Issues and Trends. Toronto: Butterworths, 1984.

SCHAPIRO, M. A Study of Adoption Practice. Child Welfare League of America, 1955.

SILAS, FAYE A. "Reunions: Laws Open Adoption Records." (1984) 70 American Bar Association Journal 38.

SLOMNICKA, B.I. Law of Child Care. Estorer, Plymouth: Macdonald &

Evans, 1982.

SMITH, GRAY J. AND ALFRED W.J. DICK. "Recent Changes in Ontario Adoption Legislation." (1960) 2 Osgoode Hall Law Journal 130.

SMITH, ROGER. Children and the Courts. London: Sweet and Maxwell, 1979.

SOROSKY, ARTHUR D., ANNETTE BARAN, AND REUBEN PANNOR. The Adoption Triangle. New York: Doubleday, Anchor Press, 1978.

STONE, OLIVE. Family Law. London: The Macmillan Press Ltd., 1977.

THOMPSON, D.C. "Inter-Faith Adoption: The Other Approach." (1963) 6 Canadian Bar Journal 115.

TIZARD, BARBARA. Adoption: A Second Chance. London: Open Books, 1977.

TRISELIOTIS, JOHN P. Evaluation of Adoption Policy and Practice. Edinburgh: Edinburgh University Press, 1970.

----------. New Developments in Foster Care and Adoption. London: Routledge & Kegan Paul, 1980.

----------. In Search of Origins. The Experiences of Adopted People. London and Boston: Routledge & Kegan Paul, 1973.

TRUDEL, G. "Clinique sur l'Adoption d'enfants Légitimes." (1965) 25 Revue du Barreau 31.

TUCK, G.S. AND ROBERT BURNSIDE BURGESS. "A Separation of Church and State in Ontario Adoption Procedure." (1961) 2 Osgoode Hall Law Journal 216.

Understanding Adoption. Resources and Activities for Teaching Adults About Adoption. Boulder, Colorado: Adoption Builds Families, 1980.

VANNINI, I.A. "Application by a Mother to Adopt Her Illegitimate Child." (1969) 12 Canadian Bar Journal 137.

WEISS, PAULA BARAN. "The Misuse of Adoption by the Custodial Parent and Spouses." (1979) 2 Canadian Journal of Family Law 141.

WILLIAMS, C. "Step-Parent Adoptions and the Best Interests of the Child in Ontario." (1982) 32 University of Toronto Law Journal 214.

WILSON, JEFFERY. Up Against It. Children and the Law in Canada. Toronto: Anansi, 1980.

VITA

NAME:	LYNN KETTLER PENROD
PLACE OF BIRTH:	PIQUA, OHIO, U.S.A.
YEAR OF BIRTH:	1946
POST-SECONDARY EDUCATION:	B.A. (HONS) OHIO STATE UNIVERSITY
	M.A. YALE UNIVERSITY
	Ph.D. OHIO STATE UNIVERSITY
	LL.B. UNIVERSITY OF ALBERTA
HONOURS AND AWARDS:	FULBRIGHT FELLOW
	NATIONAL ENDOWMENT FOR THE HUMANITIES FELLOW
RELATED WORK EXPERIENCE:	MEMBER, LAW SOCIETY OF ALBERTA
	BARRISTER & SOLICITOR
	DUROCHER MACCAGNO
	(1983-1985) EDMONTON, ALBERTA